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Let the Jury Decide! A Plea for the Proper Allocation of Decision-Making Authority in Louisiana Negligence Cases

Thomas C. Galligan Jr.

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Let the Jury Decide! A Plea for the Proper Allocation of Decision-Making Authority in Louisiana Negligence Cases

Thomas C. Galligan, Jr.*

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* © 2020 Thomas C. Galligan, Jr. LSU Interim President, Professor of Law, Louisiana State University Paul M. Hebert Law Center, Dodson & Hooks Endowed Chair in Maritime Law, and James Huntington and Patricia Kleinpeter Odom Professor of Law. I thank the Louisiana Judicial College, the Louisiana Defense Association of Defense Counsel, and the Louisiana Association of Justice for allowing me to present early versions of this piece. I also thank my friend and colleague Bill Corbett for his incredibly helpful suggestions; Martha Chamallis for the inspiration that courts really do not talk about policy in garden-variety tort cases; the late David Robertson for being right; and Steve Spires for his incredible research assistance. I am also indebted to my late daughter, Aisling Anne Galligan, who, while I was re-reading Leon Green during the fall of 2018, asked me why I was reading one-hundred-year-old law and really got me thinking hard about this subject. After all, even after one-hundred years, it still matters.

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I. INTRODUCTION

In every negligence case, someone must ultimately decide whether the defendant's responsibility or duty to the plaintiff includes the risk which occurred. The issue is inescapable.¹ At common law, the issue was disguised as what courts and commentators called proximate cause. As any first-year torts student will attest, neither the explanation nor the analysis of the issue was particularly satisfying. The authors of the Restatement of Torts² and the Restatement (Second) of Torts³ called the issue legal cause, an arguably more accurate name that sadly did not meaningfully contribute to any greater clarity.⁴ Louisiana, influenced by the work of Dean Leon Green and Professor Wex Malone adopted another approach—the so-called Duty/Risk approach.

Leon Green, Wex Malone, and others defrocked proximate or legal cause and pulled back the cloak covering the wizard. What Green and Malone and others did was to make clear that proximate cause and all its mumbo jumbo language, such as foreseeable, unforeseeable, foresight, hindsight, direct, remote, natural and probable, intervening causes, superseding causes, chains of causation, etc., were really not rules of law, but descriptions of results.⁵ They were shibboleths that did nothing but befog. Green and Malone made clear that when a court talked about proximate cause it was talking about two things: cause-in-fact—a factual question—and scope of duty or liability, which they considered a matter of policy, not a result which the application of some preexisting legal rule mandated.⁶

From Green and Malone's Legal Realist wisdom, the Duty/Risk method of analyzing negligence was born. The Louisiana Supreme Court essentially adopted that Duty/Risk approach to analyzing negligence in a 1962 violation of statute case, *Dixie Drive It Yourself System New Orleans Co. v. American Beverage Co.*,⁷ and in 1972, in a

1. Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 73 (1956) [hereinafter Malone, *Cause-in-Fact*].

2. RESTATEMENT (FIRST) OF TORTS § 9 (AM. LAW INST. 1934).

3. RESTATEMENT (SECOND) OF TORTS § 9 (AM. LAW INST. 1965).

4. *See id.*

5. *See, e.g.,* Wex S. Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 LA. L. REV. 363, 363-64 (1970) [hereinafter Malone, *Dixie Drive It*].

6. *See, e.g., id.*

7. 137 So. 2d 298 (La. 1962).

garden-variety negligence case where there were no statutes involved, *Hill v. Lundin & Associates, Inc.*⁸ Duty/Risk became the so-called style for negligence analysis in the state. Under the Green and Malone Duty/Risk approach to negligence, the court should expressly confront the scope of responsibility question and address it as a matter of policy in every case.⁹

As Green and Malone clearly intended and as the Louisiana Supreme Court initially implemented the approach, the judge, not the jury, was the administrative actor who decided whether the duty the defendant owed included the risk, which befell the plaintiff in the manner in which it occurred.¹⁰ The Louisiana Duty/Risk method of analysis turned the proximate cause question into a question for the judge, rather than a question for the jury.¹¹ To Green, the proximate cause question (and he eschewed the phrase proximate cause) was a question of policy for judicial determination.¹² Malone agreed.¹³

Years later, the American Law Institute, in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, followed suit¹⁴ and adopted something very much like the Duty/Risk approach.¹⁵ Section 29 provides, “An actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.”¹⁶ The Restatement (Third) abandoned the terms “proximate cause” and “legal cause” in favor of a scope of the risk analysis,¹⁷ similar to Green and Malone’s approach. But there is a critical difference between the Green/Malone Duty/Risk approach and the Restatement (Third) approach. While Green and Malone entrusted the scope of liability question to the judge, the Restatement (Third) gives it to the jury (or judge as fact finder).¹⁸

8. 256 So. 2d 620 (La. 1972).

9. See *id.* at 622; *Dixie Drive It*, 137 So. 2d at 304.

10. Malone, *Cause-in-Fact*, *supra* note 1, at 72; see Malone, *Dixie Drive It*, *supra* note 5, at 377.

11. *Hill*, 256 So. 2d at 622-23.

12. LEON GREEN, RATIONALE OF PROXIMATE CAUSE 76-77 (1927) [hereinafter GREEN, RATIONALE OF PROXIMATE CAUSE].

13. Malone, *Cause-in-Fact*, *supra* note 1, at 72; Malone, *Dixie Drive It*, *supra* note 5, at 377.

14. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. c (AM. LAW INST. 2005).

15. *Id.*

16. *Id.* § 29.

17. *Id.* § 26 cmt. a.

18. *Id.* § 26 cmt. b.

In 1997, my friend, the late Professor David W. Robertson proposed essentially the same thing for Louisiana. He called his approach, under which the jury would decide scope of the risk, a “Keetonian” approach, in honor of the eminent torts teacher and scholar, Dean Page Keeton.¹⁹ Dave and I engaged in a scholarly conversation about the issue (and other negligence-related topics) in the *Louisiana Law Review*.²⁰ I did not overtly disagree with him, but neither did I expressly agree. It is past time for me to admit that I was wrong in not expressly agreeing.²¹ I did not then sufficiently comprehend that there is a serious problem with entrusting the scope of responsibility decision to a judge. The problem is that, in a garden-variety tort case, policy is not at issue to any significant degree. What is at stake is a basic question of fairness and common sense, which is inextricably dependent upon the particular facts of the particular case.²²

Consequently, the fact finder, not the judge, should decide scope of liability or scope of the risk in a garden-variety tort case. The scope of liability is not a legal determination.²³ The scope of liability is a fact-specific decision and its resolution is case-specific. It is not a question of law. Law applies to classes of actors and classes of cases. It does not change with the minute and particular facts of isolated cases. Deciding what is fair and what comports with logic and common sense in most garden-variety tort cases is exactly why we employ juries or judges as fact finders, rather than lawgivers.

When judges decide both the broad duty question and the scope of the risk question, they blur the line between the broad, legal duty question and the scope of liability question in a specific case. Moreover, this blurring leads courts to combine or conflate duty and scope of

19. David W. Robertson, *Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases*, 57 LA. L. REV. 1079, 1092-96 (1997) [hereinafter Robertson, *Allocating Authority*]; David W. Robertson, *The Vocabulary of Negligence Law: Continuing Causation Confusion*, 58 LA. L. REV. 1, 19-21 (1997).

20. See, e.g., Thomas C. Galligan, Jr., *Cats or Gardens: Which Metaphor Explains Negligence? Or, Is Simplicity Simpler than Flexibility?*, 58 LA. L. REV. 35 (1997) [hereinafter Galligan, *Cats or Gardens*]; Thomas C. Galligan, Jr., *Revisiting the Patterns of Negligence: Some Ramblings Inspired by Robertson*, 57 LA. L. REV. 1119 (1997) [hereinafter Galligan, *Revisiting the Patterns of Negligence*].

21. Galligan, *Cats or Gardens*, *supra* note 20; Galligan, *Revisiting the Patterns of Negligence*, *supra* note 20.

22. See *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) (“What we do mean by the word ‘proximate’ is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.”).

23. See *id.*

liability.²⁴ And, as noted above, the blurring of the line between duty at a broad, categorical level and scope of liability at a case-specific level blurs the allocation of decision-making authority between judge and jury. This piece is a call for courts in garden-variety negligence cases to clearly separate duty from scope of the risk or scope of liability and to recognize that the fact finder should determine scope of liability because the decision is not based on any broad policy, but on the facts of the particular case and the fact finder's sense of fairness in that particular case.

At the same time, and on a more technical level, Louisiana courts have been inconsistent in their articulation or application of the Duty/Risk method. They have stated the elements of negligence under the Duty/Risk method in multiple, inconsistent ways. The courts should clarify the elements of negligence, the order in which administrative actors consider and analyze them, and, as noted, who should decide what question.

In Part II, I set forth the traditional approach to negligence and its elements. In Part III, I summarize Green and Malone's attack on the concept of proximate cause and their solution. Part IV discusses the birth of Louisiana's Duty/Risk method of analyzing negligence cases. Part V describes the early leading Louisiana Duty/Risk cases and how the courts did not and have not articulated and applied policy at the case-specific level. The Part also argues that courts have not done so because doing so is, in fact, inappropriate. The scope of liability in a particular case is not a policy issue but a case-specific fairness issue. Part V sets forth the inconsistent analytical approaches Louisiana courts have used under the so-called heading of Duty/Risk. Part VI briefly recaps, and Part VII discusses duty (not scope of liability) as policy. Part VIII argues that it is time for Louisiana to follow the Restatement (Third) of Torts: Liability for Physical and Emotional Injury's approach to scope of liability and give the question to the fact finder. Part IX briefly concludes.

24. The courts have also conflated duty and breach, but that is a topic for another article.

II. THE TRADITIONAL APPROACH TO NEGLIGENCE

Traditionally, negligence had four elements: duty, breach, causation, and damages.²⁵ Thanks to the work of the realists and others, the law now predominantly breaks the causation question into two separate elements: cause-in-fact and proximate cause.²⁶ Some, including the Restatement²⁷ and Restatement (Second) of Torts,²⁸ replaced “proximate cause” with “legal cause.” Under the most common approach to negligence, duty is a question for the court—a legal question.²⁹ The other elements were all questions for the jury—either factual questions or mixed questions of fact and law.³⁰ Expressed in table form, negligence was:

Element	Who Decides
Duty	Judge
Breach	Jury
Cause-in-Fact	Jury
Proximate/Legal Cause	Jury
Damages	Jury ³¹

In most tort cases, duty is essentially assumed as all persons owe a duty to others to exercise reasonable care to avoid foreseeable risks.³² There were and continue to be some exceptions to this generally applicable broad duty to exercise reasonable care. For instance, in

25. See, e.g., *Kadylak v. Royal Caribbean Cruise, Ltd.*, 167 F. Supp. 3d 1301, 1308 (S.D. Fla. 2016); *Hayes v. D.C.I. Props.-D KY LLC*, 563 S.W.3d 619, 622 (Ky. 2018); *Denman v. Coppola Gen. Contracting Corp.*, 683 N.Y.S.2d 617, 618 (N.Y. App. Div. 3 1998).

26. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBBLICK, *DOBBS' LAW OF TORTS* § 124, Westlaw (database updated June 2019) [hereinafter DOBBS ON TORTS].

27. RESTATEMENT (FIRST) OF TORTS § 9 (AM. LAW INST. 1934).

28. RESTATEMENT (SECOND) OF TORTS § 9 (AM. LAW INST. 1965).

29. See, e.g., Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1510-11 (1993) [hereinafter Galligan, *Primer*].

30. See *id.* at 1510-15.

Mixed questions of law and fact are defined “as questions in which the historical facts are admitted or established, the rule of law is resolved and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.”

Mixed Question of Law and Fact Law and Legal Definition, US LEGAL, <https://definitions.uslegal.com/m/mixed-question-of-law-and-fact/> (last visited Apr. 4, 2020) (quoting *Bausch & Lomb, Inc. v. United States*, 21 Ct. INT'L TRADE 166, 169 (Ct. Int'l Trade 1997)).

31. See Galligan, *supra* note 29, at 1510-15.

32. See DOBBS ON TORTS, *supra* note 26, § 125.

certain, broad categories of cases, the law traditionally did not recognize a duty even though the defendant's conduct posed a foreseeable risk of harm to another. In each of these areas there were policy reasons for not imposing liability. For instance, courts held that a defendant had no duty to affirmatively act to help another person.³³ Courts based this rule, in part, on the difference between misfeasance and nonfeasance and the philosophical notion that one should have the liberty to choose or to choose not to help another.³⁴ Courts also held that a defendant had no duty to exercise reasonable care to protect against negligently inflicted emotional distress.³⁵ That rule was based, in part, on doubts about administrative competence.³⁶ Courts doubted that judges and juries effectively could determine whether someone had really suffered emotional distress.³⁷ The law doubted, given the available science, that decision makers reliably could separate the real from the fraudulent or overstated claims.³⁸ There was also a fear that the courts would be inundated with claims.³⁹ Likewise, a defendant owed no duty to protect against negligently inflicted economic loss unless there was some personal injury or property damage as well.⁴⁰ Courts based this rule on an administrative concern that otherwise tort law would essentially devour the law of contracts.⁴¹ In addition, courts were concerned that liability would be unlimited or potentially unlimited thereby over deterring societal actors, i.e., frustrating otherwise beneficial activity.⁴² And, knowing that a court had to draw a liability/no liability line somewhere, there was a concern that recognizing liability on a case-by-case basis would be arbitrary, thus undermining reliance, trust, and confidence in the legal system.⁴³

There were other no-duty rules. Today many of the traditional no-duty rules have eroded to some extent. But where there is a duty today in these former no duty zones, there are conditions or limitations to

33. *Id.* § 405.

34. *See id.*

35. *Id.* § 390.

36. *See id.*

37. *See id.*

38. *Id.*

39. *See id.*

40. *Id.* § 515.

41. *See, e.g.,* *E. River S.S. Corp. v. Transam. Delavel Inc.*, 476 U.S. 858, 866 (1986).

42. *See id.* at 874. It is fascinating that while courts have and do express concern for overdeterrence, the concern is never empirically demonstrated. *See, e.g.,* *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1029 (5th Cir. 1985), *cert. denied sub nom* *White v. M/V Testbank*, 477 U.S. 903 (1986).

43. *Louisiana ex rel. Guste*, 752 F.2d at 1028-29.

proceeding, so one might call them conditional or limited duties, meaning simply that in many of the traditional no-duty cases, there are requirements for recovery beyond causing a foreseeable injury to another person. For instance, in a Louisiana negligent infliction of emotional distress bystander case, the bystander must witness the direct victims suffer injury or come upon the scene shortly thereafter, there must be an identified familial relationship between the person who sues for emotional distress and the person who suffered the injury, and more.⁴⁴

All of these old no-duty rules were based upon policy analyses prevalent at the time the courts articulated them. These policy justifications for traditional no duty rules are what Green might have called the “administrative” factor.⁴⁵ That is, the relevant policy had to do with administrative concerns about the court’s ability to consistently deal with either a type of issue (psychological injury) or the volume of litigation potential liability might spawn.⁴⁶ The current conditions for or limitations to recovery also reflect policy concerns, but the policies apply at the categorical level, not at the case-specific level. That is, the courts perform the policy analysis at a broad level of generality. The decision not to recognize a duty or to create a conditional duty applies to all similar cases; it does not turn on the facts of the particular case.⁴⁷ Even if limited or no duty rules yield harsh results in particular cases, the broader policy objectives are served. At the categorical level, the law should be predictable and consistent, if not always fair on the particular facts.

Returning to the theme of the Introduction, duty is not as easy and clear as I have just made it because one of the things that continues to make duty and proximate cause confusing to the law student and lawyer is Justice Cardozo’s majority opinion in *Palsgraf v. Long Island Railroad Co.*⁴⁸ It is confusing because the burgeoning lawyer reads it when her class begins to discuss and study “proximate cause,” but what

44. LA. CIV. CODE art. 2315.6 (2020); *see also* Trahan v. McManus, 97-1224, p. 14 (La. 3/2/99); 728 So. 2d 1273, 1281 (holding that parents may not recover for emotional distress associated with watching their son die after health care providers misdiagnosed his condition).

45. LEON GREEN, JUDGE AND JURY (1930) [hereinafter GREEN, JUDGE AND JURY].

46. *Id.* at 84-87. Of course, there never seems to be any real empirical support for the volume fear. The sky may well be threatening to fall (an allusion to the tale of “Chicken Little”), but there is never any radar (an allusion to weather) to indicate that is actually about to occur.

47. *Id.* at 77-87.

48. 162 N.E. 99 (N.Y. 1928).

Cardozo actually said (amongst other things) was that “[t]he plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.”⁴⁹ That is, he seemed to say there was no duty owed.⁵⁰ He continued: “[T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.”⁵¹ But what is the relationship between proximate cause and duty? Doesn’t everyone, absent some broad policy or policies applicable to classes of cases, owe a duty to protect against foreseeable harm?⁵² It would seem so. But let me pause before giving my answer to that question (which is yes) and turn to the work of Green and Malone and the birth of Duty/Risk.

III. GREEN AND MALONE AND THE ATTACK ON PROXIMATE CAUSE

No scholar writes on a clean slate. All work depends upon the work of those who have come before, and there were many important torts scholars before Leon Green whose work he built on.⁵³ But Green was singular and focused in his pointed and sustained attack on the so-called doctrine of proximate cause.⁵⁴ Later, LSU Law Professor Wex Malone joined Green in his assault. Green was a Louisianan who gained fame elsewhere. Malone was a North Carolinian who achieved fame for his work while teaching in Louisiana at LSU.

Green was a legal realist. Legal realism was a complex and significant school of legal thought that really began to develop in the early part of the twentieth century and flourished just before and during the New Deal era.⁵⁵ The realists were reacting to and challenging Legal Formalism, which held that judges decided cases based upon existing law and legal decisions.⁵⁶ The notion of the law library as a place to discover the law is a formalist view of law because it implies that the

49. *Id.* at 100.

50. *See id.*

51. *Id.*

52. *See id.* at 103 (Andrews, J., dissenting) (“Every one [sic] owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.”). For the modern view, see also DOBBS ON TORTS, *supra* note 26, § 125 (describing the elements of negligence).

53. For a thorough discussion of the work both before and after Green, see Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L. Q. 49 (1991).

54. *See, e.g.,* GREEN, JUDGE AND JURY, *supra* note 45; GREEN, RATIONALE OF PROXIMATE CAUSE, *supra* note 12.

55. *See* Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 734 (2009).

56. *See id.* at 750.

seeker will discover the law in the law books included therein.⁵⁷ A thorough discussion of legal realism is well beyond the scope of this Article, but to quote Professor Brian Leiter:

The Core Claim of Legal Realism consists of the following descriptive thesis about judicial decision-making: judges respond primarily to the stimulus of facts. Put less formally—but also somewhat less accurately—the Core Claim of Realism is that judges reach decisions based on what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law.⁵⁸

Thus, in part, Green was reacting to and revolting against the idea that there was a formalist, determinative “law” of proximate cause. To Green and others, there were several inherent problems in the idea of proximate cause. First, as mentioned above, courts were prone, when referring to proximate cause, to lump what we now think of as cause-in-fact together with scope of liability as one element.⁵⁹ The separation of cause-in-fact from the determination of the scope of liability (or duty) was meaningful and significant. The former—cause-in-fact—is a primarily factual question. The scope of liability (or duty) questions involves other considerations.⁶⁰ In essence the separation of cause-in-fact and scope of liability meant negligence had five elements not four.

An additional objection to the traditional proximate cause analysis remains the continuing tendency of some judges to refer to the “sole”⁶¹

57. Now, one supposes the formalist would discover the law on his or her computer searching legal databases.

58. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275 (1997).

59. GREEN, JUDGE AND JURY, *supra* note, 45 at 186-95; GREEN, RATIONALE OF PROXIMATE CAUSE, *supra* note 12, at 132-41; *see also* Malone, *Cause-in-Fact*, *supra* note 1 (detailing cause-in-fact, including how it can relate to scope of liability).

60. Interestingly, while its roots are clearly in legal realism, the courts have sometimes said it comports with the civilian tradition. *Landry v. Bellanger*, 2002-1443, p. 13 (La. 5/20/03); 851 So. 2d 943, 953 (“civilian concepts” such as “duty/risk”); *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1132 (La. 1988); *Polk v. Blanque*, 93-1740 (La. App. 4th Cir. 3/15/94); 633 So. 2d 1382, 1387 (“Under the duty/risk analysis adopted in our civilian jurisdiction”); *LeJeune v. Rayne Branch Hosp.*, 539 So. 2d 849, 856, 857 (La. App. 3d Cir. 1989) (“civilian principles of duty/risk” and “civilian duty-risk analysis”); *Bishop v. Callais*, 533 So. 2d 121, 123 (La. App. 4th Cir. 1988) (“civilian principles of duty risk”).

61. *See, e.g.*, *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 839 (1996); *Turlington v. Phillips Petroleum Co.*, 795 F.2d 434, 440 (5th Cir. 1986); *Adriatic Ins. Co. v. Holt*, 617 So. 2d 184, 186 (La. App. 3d Cir. 1993); *Thomas v. Champion Ins. Co.*, 603 So. 2d 765, 770 (La. App. 3d Cir. 1992); *Everett v. La. Dept. of Transp. & Dev.*, 424 So. 2d 336, 341-42 (La. App. 1st Cir. 1982); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 452 (W. Page Keeton ed., 5th ed. 1984); *cf.* *CSX Transp. Inc. v. McBride*, 564 U.S. 685, 688 (2011) (quoting *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 504-06 (1957)) (discussing the traditional formulation of proximate cause).

cause of an accident. The idea that there is a sole cause of any event is ridiculous. Courts used and use the phrase “sole” proximate cause to relieve a defendant of liability, finding either some other person⁶² or even the plaintiff⁶³ was the “sole” proximate cause of the injury. Courts sometimes used the phrase in conjunction with the concept of the intervening cause, which could rise to the level of a superseding cause⁶⁴ and thereby break the so-called chain of causation and relieve the defendant of liability.⁶⁵ In common parlance, the superseding cause let the defendant, perhaps a railroad or other industrially significant entity, off the liability hook.

A related target for Green was the tendency of courts to relieve all but the last piece or actor in the causation chain of liability.⁶⁶ That is, the courts overly concerned themselves with the sequence of events,⁶⁷ rather than the logic or fairness of what had happened and how it had happened, a trend that continues today.⁶⁸ The adjective “proximate,” meaning near, no doubt fueled this illogical fire. This tendency might manifest itself in a conclusion that the injury was remote in time and space from the defendant’s negligent act.⁶⁹ It is not reading too much between the lines to say that the realists were more concerned with the practical substance of things rather than the sequence.

Lastly, for present purposes, Green bristled at the fact that courts said that proximate cause was a question for the jury, that courts submitted the question to juries, and then, if they did not agree with the juries’ conclusion, they reversed them. He said:

62. See, e.g., *Hessifer v. So. Equip., Inc.*, 416 So. 2d 368, 373 (La. App. 1st Cir. 1982).

63. *Exxon Co.*, 517 U.S. at 839-41.

64. See, e.g., *Ins. Co. v. Tweed*, 74 U.S. 44, 52-53 (1868); *Johnson v. Morehouse Gen. Hosp.*, 2010-0387, pp. 43-44 (La. 5/10/11); 63 So. 3d 87, 116-17; *Adams v. Rhodia, Inc.*, 2007-2110, p. 13 (La. 5/21/08); 983 So. 2d 798, 808.

65. See, e.g., *Exxon Co.*, 517 U.S. at 839-40.

66. For a rejection of the last cause argument in a FELA case, see *CSX Transportation Inc. v. McBride*, 564 U.S. at 712 (Roberts, C.J., dissenting).

67. See, e.g., *Atchison Topeka & Santa Fe Ry. Co. v. Calhoun*, 213 U.S. 1, 7 (1909); *Rossiter v. Aetna Cas. & Sur. Co.*, 255 So. 2d 103, 109 (La. App. 2d Cir. 1971); *Hoover v. Wagner*, 189 So. 2d 20, 27 (La. App. 1st Cir. 1966); *Kendall v. New Orleans Pub. Serv.*, 45 So. 2d 541, 544 (La. App. Parish of Orleans 1950); *Williams v. Pelican Creamery Inc.*, 30 So. 2d 574, 576-77 (La. App. 1st Cir. 1947); *Cavaretta v. Universal Film Exchs.*, 182 So. 135, 140 (La. App. 1st Cir. 1938).

68. See, e.g., *Jacobs-Peterson v. United States*, 219 F. Supp. 3d 1091, 1096-97 (D. Utah 2016); *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996).

69. See, e.g., *Scheffer v. R.R. Co.*, 105 U.S. 249, 252 (1881); *Salsedo v. Palmer*, 278 F. 92, 98 (2d Cir. 1921); *Ardoin v. Williams*, 108 So. 2d 817, 821 (La. App. 2d Cir. 1959); *Terrill v. ICT Ins. Co.*, 93 So. 2d 292, 295 (La. App. 1st Cir. 1957); *Cruze v. Harvey & Jones*, 134 So. 730, 732 (La. App. 2d Cir. 1931).

If the result obtained from erroneously leaving the fictitious “cause” issue to the jury is palpably unjust, or if the result of leaving it to the jury would probably be so, the appellate court declares *as a matter of law* that there was in fact no causal relation issue to be left to the jury, and proceeds to deal with it as an issue of causation for the court. Here they make use of all those weighted phrases as “remote,” “unforeseen,” “intervening agencies,” “independent agencies,” and a score of others which are meaningless as solvents except they provide a smoke screen behind which the court can retire from an awkward position. They do here under the guise of determining “proximate cause” what should have been done by way of defining the scope of protection afforded by the rule invoked.⁷⁰

Thus, the “law” of proximate cause was a sham. Judges were giving the question to the jury but then taking it away if they disagreed with the result.⁷¹ Moreover, rather than explaining what was really going on—a judicial decision—they resorted to magic words that shielded the real process.⁷² This ruse also shielded who was really deciding—the judge.

Green believed that the judge should determine the scope of liability. That is evident in the last sentence quoted above.⁷³ Put differently, he said judges “do not recognize that they have a function to perform by way of defining the limits of the rule involved.”⁷⁴ Malone agreed.⁷⁵ Thus to Green and Malone, the scope of liability (or duty) was a question for the judge.⁷⁶ This is not inconsistent with Professor Leiter’s contention that the core claim of legal realism was that judges were influenced by the facts, not legal rules.⁷⁷ The realists believed that judges decided based on facts, underlying biases, and their backgrounds.⁷⁸ They did not decide merely because of doctrinal compulsion. While critical of formalism and judicial hocus pocus, the

70. GREEN, RATIONALE OF PROXIMATE CAUSE, *supra* note 12, at 76-77.

71. *Id.* at 76.

72. *Id.* at 76-77.

73. *Id.* at 77 (“They do here under the guise of determining ‘proximate cause’ what should have been done by way of defining the scope of protection afforded by the rule invoked.”).

74. *Id.* at 76.

75. Malone, *Cause-in-Fact*, *supra* note 1, at 72; *see* Malone, *Dixie Drive It*, *supra* note 5.

76. Thus, aligning with Judge Cardozo’s analysis in *Palsgraf*. *See* *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 101 (N.Y. 1928).

77. Leiter, *supra* note 58, at 275.

78. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2 (2007); *cf.* Tamanaha, *supra* note 55, at 732 (describing the practicalities of realist judges).

realists had an optimistic side, or at least some of them did. The realists opined that once judges admitted what was going on and once they relied upon principle and data, the law might develop more rationally or at least more openly.⁷⁹ Green hoped that perhaps then judges admittedly and openly deciding scope of liability questions would result in a more transparent and consistent law or field of negligence.

Importantly, in contending that judges should decide scope of liability, Green and Malone did not distinguish between the scope question in classes of cases or the scope question in particular cases. In all instances, the judge decided the scope of liability. Malone noted his view in one of his most famous articles, *Ruminations on Cause-in-Fact*.⁸⁰

The task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken by the court in each case as it arises. How appropriate is the rule to the facts of this controversy? This is a question that the court cannot escape.⁸¹

The scope of liability was omnipresent, and it was a decision for the judge. The judge could not “escape” it.⁸² That is, the court cannot escape the question (as some put it) whether the defendant owes a duty to the plaintiff to protect against the risk that arose in the manner in which it arose.⁸³

But, how would the court determine the scope of the liability? Green claimed that the scope of liability decision was based on several policy factors: the administrative factor, the ethical or moral factor, the economic factor, the prophylactic or preventive factor, and the justice factor, including the capacity to bear the loss.⁸⁴ And Green apparently believed that basing proximate cause decisions on probability of harm, or foreseeability, was improper.⁸⁵ Asserting that tort liability was based on public policy—not doctrine—was significant and remains the mainstream view; I will return later to the practical and theoretical realities of the application of policy to the particular facts of a garden-

79. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 977-78 (1977).

80. Malone, *Cause-in-Fact*, *supra* note 1, at 73.

81. *Id.*

82. *Id.*

83. See FRANK L. MARAIST, THOMAS C. GALLIGAN, JR., WILLIAM R. CORBETT & JOHN M. CHURCH, LOUISIANA TORT LAW § 5.01, Lexis Advance (database updated Dec. 2019).

84. See GREEN, JUDGE AND JURY, *supra* note 45, at 74-152.

85. See GREEN, RATIONALE OF PROXIMATE CAUSE, *supra* note 12, at 76.

variety tort case. But first it is important to point out another key aspect of the Green and Malone Duty/Risk analysis.

Green and Malone both talked about the “rule of law” on which the plaintiff relied.⁸⁶ The plaintiff supposedly pointed to a rule of law that it claimed the defendant violated. The judge considered whether that rule of law included the risk that injured the plaintiff. If so, the jury would decide whether the defendant, in violating the so-called rule of law, had failed to exercise reasonable care, i.e., had breached the standard of reasonable care, and, if so, whether the breach was a factual cause of the plaintiff’s injuries. Sometimes the rule of law might be statutory and sometimes it might be “part of the fabric of the court-made law of negligence.”⁸⁷

It is somewhat ironic that those who attacked formalism would refer to “rules of law,” especially those that were part of the fabric of court-made negligence. Are these rules of law judge-made rules? The idea of judge-made, conduct-based rules of law is reminiscent of Justice Oliver Wendell Holmes Jr.’s notion that, as judges became experienced, they would more freely take questions of breach from the jury. One such judge-made rule or duty was Holmes’ “stop, look, and listen” rule.⁸⁸ It was notably short-lived and ill-advised because reasonable care varies with the facts of each case.⁸⁹ Somewhat ironically, it was Justice Benjamin Cardozo, the author of *Palsgraf*, who gently criticized and effectively buried Holmes’ “stop, look, and listen rule” only seven years after Holmes uttered it.⁹⁰ In short there was, once and for all, no set in stone “stop, look, and listen rule.”⁹¹

One is left with the idea that the “rules of law” to which Green and Malone referred, at least when not based on statute, were not really rules of law so much as the judge (and scholar) turning what the plaintiff claimed was the defendant’s alleged negligent act into a duty

86. *Id.* at 3-4; W. Malone, *Cause-in-Fact*, *supra* note 1, at 73; *see also* William L. Crowe, Sr., *The Anatomy of a Tort—Greenian, as Interpreted by Crowe Who Has Been Influenced by Malone—a Primer*, 22 LOY. L. REV. 903, 906 (1976) (discussing rule of law in the Duty/Risk analysis); Timothy J. McNamara, *The Duties and Risks of the Duty-Risk Analysis*, 44 LA. L. REV. 1227, 1233 (1984) (discussing rule of law in the Duty/Risk analysis).

87. Malone, *Cause-in-Fact*, *supra* note 1, at 73.

88. *See* Balt. & Ohio R.R. Co. v. Goodman, 275 U.S. 66, 67-70 (1927).

89. *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 105 (1934) (rejecting the hard and fast rule of *Goodman*).

90. *See id.* at 99.

91. *Id.* at 105-06.

or rule for the particular case.⁹² But generally, the defendant's duty is to exercise reasonable care under the circumstances.⁹³ The particular alleged act of negligence is fact-based; it is not a rule of law.⁹⁴ Certainly, this is the case where no statute is involved. By way of example, assume the plaintiff claimed that the defendant had failed to exercise ordinary care by eating a bagel, drinking coffee, and driving at the same time, resulting in the defendant hitting the plaintiff, a pedestrian, because the defendant was distracted by his various ingestions. The particular alleged act of negligence would morph into the "rule of law:" thou shalt not eat a bagel and drink coffee and drive at the same time. Of course, there really is no rule of law except the duty to exercise reasonable care under the circumstances. The bagel eating and coffee drinking while driving are facts that allegedly rise to the level of a breach. There is no rule and clearly no "law."

Returning to the orthodox Duty/Risk approach, the judge would decide the scope of the rule of law (or scope of liability or duty). The judge would decide whether the "rule of law" prohibiting a person from eating a bagel, drinking coffee, and driving at the same time protected the plaintiff/pedestrian from being injured when the defendant hit her because he was distracted. Per Green and Malone, the judge would make this decision based on "policy."⁹⁵

In any event, if the judge decided the "rule of law" included protection from the risk that occurred, the jury or fact finder would still have to decide whether the defendant failed to exercise reasonable care when the defendant ate a bagel, drank coffee, and drove at the same time. Was the particular alleged act of negligence (the so-called rule of law), in fact, a breach of the standard of reasonable care? And the jury, if it decided there was a breach, would then decide whether the breach was a factual cause of the injuries (cause-in-fact) and, if needed, damages. That was the theory of Duty/Risk. Now let us turn to the Louisiana experience.

92. This discussion is very important in regard to the impact of Duty/Risk on breach, but it is also essential here insofar as it is crucial to an understanding of the approach. Ironically, by turning the particular alleged breach into a so-called rule of law, the realists obfuscated it. They used a phrase—rule of law—which was a misnomer. They also thus empowered the judge to hide behind that phrase as if he or she were making a judicial or legal decision, rather than a fairness decision.

93. *Pontchartrain Nat. Gas Sys. v. Tex. Brine Co.*, 2018-0606, p. 8 (La. App. 1st Cir. 12/21/18); 268 So. 3d 1058, 1062 ("In negligence cases, there is an almost universal duty on the part of a defendant to use *reasonable* care to avoid injuring another.").

94. *See id.* at p. 8; 268 So. 3d at 1062-63.

95. *See, e.g., Malone, Dixie Drive It, supra* note 5, at 363-64.

IV. THE BIRTH OF DUTY/RISK LOUISIANA STYLE

This Part provides a brief review of the introduction of Duty/Risk into Louisiana jurisprudence and its subsequent development. The discussion is not intended to be encyclopedic but will attempt to set forth the highlights in an evenhanded manner.

A. *Dixie Drive It Yourself System New Orleans Co. v. American Beverage Co.*

The jurisprudential genesis of Duty/Risk in Louisiana is *Dixie Drive It Yourself System New Orleans Co. v. American Beverage Co.*⁹⁶ *Dixie Drive It Yourself* was, at its heart, a garden-variety traffic accident case.⁹⁷ Dixie had leased its truck to Gulf States Screw Products Company.⁹⁸ Langtre, a Gulf States employee, was driving the Dixie truck southbound on Airline Highway.⁹⁹ It was drizzling or misting.¹⁰⁰ The important thing to know about the truck lease was simply that Langtre was not Dixie's employee; therefore, the law would not impute Langtre's negligence to Dixie.¹⁰¹

As Langtre drove south, unbeknownst to him, an R C Cola truck, owned by defendant American Beverage Company, had broken down in the same lane in which Langtre was traveling.¹⁰² The breakdown occurred eight to ten minutes before Langtre appeared on the scene.¹⁰³ The driver of the R C Cola truck did not move the vehicle to provide fifteen feet of unobstructed highway in violation of a statute.¹⁰⁴ Nor did the driver of the R C Cola truck display warning signals one hundred feet behind and one hundred feet in front of the stalled vehicle.¹⁰⁵ This failure was a violation of another statute.¹⁰⁶ Finally, the driver did not take any action to warn approaching motorists of the stalled vehicle, arguably in violation of common sense and the general duty to exercise reasonable care.¹⁰⁷

96. 137 So. 2d 298 (La. 1962).

97. *Id.* at 299-300.

98. *Id.* at 299.

99. *Id.*

100. *Id.* at 300.

101. *Id.* at 301.

102. *Id.* at 300.

103. *Id.*

104. *Id.* at 301-02 (quoting LA. R.S. § 32:241 (1951) (repealed)).

105. *Id.*

106. *Id.* (quoting LA. R.S. § 32:442 (1951) (repealed)).

107. *Id.* at 301, 304.

Predictably, Langtre did not notice the R C Cola truck until it was too late to stop.¹⁰⁸ Langtre attempted to move into the left lane, but there was another car in the left lane.¹⁰⁹ Thus, Langtre jammed on his brakes but could not avoid a collision.¹¹⁰ A lawsuit followed. The plaintiff, Dixie, sought recovery for the damage to its truck.¹¹¹ The defendant argued that the R C Cola truck driver was not negligent and that the “sole cause” of the accident was Langtre’s driving at an excessive rate of speed given the conditions, failing to keep a proper lookout, and failing to have his vehicle under sufficient control to avoid the collision.¹¹² Even if Langtre’s negligence could not be imputed to Dixie because he was not their employee, his misconduct could still form the basis of the “sole cause” defense.¹¹³ The trial court held for the defendant, and the court of appeal affirmed,¹¹⁴ concluding that although the R C Cola driver violated the statutes requiring the placement of warning signals and leaving fifteen unobstructed feet of roadway, his negligence was not a proximate cause of the accident.¹¹⁵

The Louisiana Supreme Court reversed. It focused its analysis on the signaling statute.¹¹⁶ It noted that the statute was a safety statute, designed to protect “life and property on the highways.”¹¹⁷ As such, the court said the violation of the statute was “negligence per se”¹¹⁸ and would be actionable if the violation “was a legal cause of the collision.”¹¹⁹ Justice Sanders wrote:

108. *Id.* at 300.

109. *Id.*

110. *Id.*

111. *Id.* at 299.

112. *Id.* at 301. Interestingly, the so-called sole cause involved multiple alleged wrongs. *Id.*

113. *Id.* at 301, 304. Another way to say it would be that Langtre’s negligence was an intervening cause, which rose to the level of a superseding cause. *Id.* at 304.

114. *Id.* at 301.

115. *See* Dixie Drive It Yourself Sys. New Orleans Co. v. Am. Beverage Co., 128 So. 2d 841, 843 (La. App. 4th Cir. 1961), *rev’d*, 137 So. 2d 298 (La. 1962) (“Whatever negligence may have been involved on the part of the driver of the defendant vehicle had become passive and too remote to be a contributing cause of the accident. The sole proximate cause thereof was the negligence of the driver of the plaintiff truck. The defendant is not liable because the negligence of its employee-driver was not a proximate cause of the accident.”).

116. *Dixie Drive it Yourself*, 137 So. 2d at 302 (“We conclude that the driver violated the statute by failing to display the red signal flags and to reasonably discharge his responsibility to protect traffic.”).

117. *Id.*

118. *Id.* Today in Louisiana the procedural effect of violation of a statute in a negligence case is probably only evidence of negligence and not negligence per se, but the idea that the violation of a statute is relevant and possibly determinative in a case is still true.

119. *Id.*

There is no universal formula for the determination of legal cause. In the instant case it bifurcates into two distinct inquiries: whether the negligence of the obstructing driver was a cause-in-fact of the collision; and whether the defendants should be relieved of liability because of the intervening negligence of the driver of the Dixie truck.

It is clear that more than one legally responsible cause can, and frequently does, contribute to a vehicular collision.¹²⁰

The two quoted, short paragraphs are significant because they do four things, all of which are consistent with the Green/Malone assault on proximate cause. First, and notably, Justice Sanders used the phrase "legal cause," rather than proximate cause, something, as noted, the drafters of the first two Restatements also did.¹²¹ Second, he bifurcated his legal cause analysis into its two separate parts: (1) cause-in-fact and (2) scope of liability, i.e., whether to relieve the defendant from liability because of the "intervening"¹²² act of Langtre.¹²³ While the use of the word "intervening" is perhaps unfortunate given the intellectual history described above, the essence of the second inquiry, albeit under the guise of deciding whether to relieve the defendant of liability, is the scope of liability for the violation of statute. Thus, the third significant point—scope of liability—is a key inquiry in a negligence case. And finally, Justice Sanders expressly stated that there can be more than one legally responsible cause for an accident—thereby refuting the idea of the "sole" proximate cause.¹²⁴

Justice Sanders then turned to the analysis of cause-in-fact and concluded that the violation of the statutes was a cause-in-fact of the collision.¹²⁵ Next, it was incumbent upon the court to determine the scope of the liability—i.e., whether to relieve the defendant of liability.¹²⁶ As noted, Justice Sanders expressly recognized that "whether a defendant should be relieved of liability because of the intervening negligence of another is frequently couched in terms of

120. *Id.*

121. RESTATEMENT (FIRST) OF TORTS § 9 (AM. LAW INST. 1934); RESTATEMENT (SECOND) OF TORTS § 9 (AM. LAW INST. 1965).

122. *Dixie Drive It Yourself*, 137 So. 2d at 302.

123. Malone, *Dixie Drive It*, *supra* note 5, at 377 ("I suggest that *Dixie*'s potential for usefulness lies, not in any novelty that inheres in the decision, but rather in its insistence that cause and legal duty be approached as separate matters and that the considerations of policy be liberated from the chrysalis of causation jargon and allowed to stand on their own footing.").

124. *Dixie Drive It Yourself*, 137 So. 2d at 302.

125. *Id.* at 302-04.

126. *Id.* at 304.

proximate cause.”¹²⁷ He then set forth the Louisiana Court of Appeals for the Fourth Circuit’s conclusion that the R C Cola driver’s negligence had become too passive and remote, thereby negating his action as a proximate cause of the injury.¹²⁸ In response to that conclusion, Justice Sanders said: “The thrust of th[e Fourth Circuit Court of Appeal’s] formulation of law is toward relieving all but the last wrongdoer of liability to an innocent victim in torts involving intervening negligence. This restrictive doctrine finds little support in legal theory. We do not subscribe to the formulation as applied in this case.”¹²⁹

Recognizing that the nub of the question was “whether the risk and harm encountered by the plaintiff fall within the scope of protection of the statute,”¹³⁰ Justice Sanders then proceeded to consider the scope of the statute. After citing and reviewing several cases and a student note,¹³¹ Justice Sanders cited Leon Green’s *Rationale of Proximate Cause* and wrote:

The inattention or confusion of motor vehicle drivers is not a highly extraordinary occurrence. The objective of the statutory provisions violated in the instant case was to protect against the likelihood that an oncoming motorist, whether cautious, confused or inattentive, would fail to timely perceive the vehicle or that it was stationary and become involved in an accident. The law was designed to protect the plaintiff (and any member of its class) against such an accident as occurred in this case. To deny recovery because of the plaintiff’s exposure to the risk from which it was the purpose of the law to protect him would nullify the statutory duty and render its protection meaningless. The negligence of the driver of the Dixie truck was responsive to that of the driver of the R C Cola truck. It was dependent upon it. The negligence of the two combined to bring about harm to the plaintiff.¹³²

Thus, according to the court, the legislature had passed the statute in question, intending it to protect from injury arising from both an attentive and/or an inattentive driver colliding with a stopped vehicle. Interpreting the statute otherwise—not to include the risk of the

127. *Id.*

128. *Id.* (quoting *Dixie Drive It Yourself New Orleans Co. v. Am. Beverage Co.*, 128 So. 2d 841, 842 (La. App. 4th Cir. 1961), *rev’d*, 137 So. 2d 298 (La. 1962)).

129. *Id.* (footnote omitted).

130. *Id.*

131. *Id.* at 304-05 (quoting Jesse D. McDonald, Comment, *Proximate Cause in Louisiana*, 16 LA. L. REV. 391, 396 (1956)).

132. *Id.* at 305-06 (citing GREEN, *RATIONALE OF PROXIMATE CAUSE*, *supra* note 12, at 142-44).

inattentive driver—would have rendered the statute meaningless, in part. This the court refused to do. Duty/Risk was born in Louisiana.

To recap *Dixie Drive it Yourself*, the court distanced itself from, if not eschewed, the phrase “proximate cause.” The court clearly recognized that “cause” involved a factual inquiry—cause-in-fact—and a more nuanced issue: the scope of liability.¹³³ Or, as the court put it, whether to relieve the defendant from liability.¹³⁴ The court, following Green and Malone, decided the scope of liability question itself and explained itself, rather than relying on the mumbo jumbo magic words associated with proximate cause.¹³⁵ And Justice Sanders expressly stated that there can be more than one cause of any accident and courts should not limit their consideration of the scope of liability to the sequence of events or whether the defendant’s negligence had become “passive.”¹³⁶

Let us tarry for a few words over one aspect of the opinion: the court’s allocation of the scope of liability decision to itself. That is, the court decided scope of liability.¹³⁷ Is that because scope of liability is always a question for the court? Green¹³⁸ and Malone¹³⁹ would have contended that is the case. But interestingly, *Dixie Drive it Yourself* was not a jury trial.¹⁴⁰ It was a trial to the court, so there was no express reason to carefully consider decision-making responsibility. There is another critical reason why the court might properly decide scope of liability in a case like *Dixie Drive it Yourself* and not in every case.

That reason is that *Dixie Drive it Yourself* was not a garden-variety negligence case; it was a case in which the plaintiff relied upon the violation of a statute to establish that the defendant was negligent.¹⁴¹ When a court considers whether to adopt a statute as the standard of care in a negligence case, or to allow the jury to consider the violation of a statute as evidence of the defendant’s failure to exercise reasonable care, it asks itself two questions:

133. *Id.* at 302, 304.

134. *Id.* at 304.

135. *See id.* at 304-07.

136. *Id.* at 304 (quoting *Dixie Drive It Yourself Sys. New Orleans Co. v. Am. Beverage Co.*, 128 So. 2d 841, 842 (La. App. 4th Cir. 1961), *rev’d*, 137 So. 2d 298 (La. 1962)).

137. *See id.* at 304-07.

138. *See* GREEN, RATIONALE OF PROXIMATE CAUSE, *supra* note 12, at 76-77.

139. *See* Malone, *Cause-in-Fact*, *supra* note 1, at 72-73.

140. *See* 137 So. 2d at 303.

141. *Id.* at 300.

- (1) Was the plaintiff a member of a class of persons whom the legislature enacted the statute to protect?
- (2) Was the risk that occurred within the class of risks that the legislature enacted the statute to guard against?¹⁴²

Answering those two questions requires the court to interpret the statute.¹⁴³ In deciding question one, the court is essentially determining if the statute imposes an obligation on the defendant in favor of the plaintiff.¹⁴⁴ And in answering the second question, the court is deciding whether the statute imposes an obligation concerning the risk that arose in the case.¹⁴⁵ The court is deciding the scope of liability. The court is deciding whether, pursuant to the court's interpretation of the statute, the defendant owes a duty to protect the plaintiff (Q1) from the risk (Q2) that arose in the manner in which it arose.

The entire judicial exercise in a violation of statute case involves the interpretation of a statute. Statutory interpretation is an inherently judicial function, and answering questions one and two in a violation of statute negligence case is appropriate for the court, as opposed to the fact finder (jury). Judges and lawyers are trained to read and interpret statutes. We go to law school for three years, and statutory interpretation is one of the core activities in which we engage. Statutes are often complicated and technical. It would be ludicrous to ask a jury to initially¹⁴⁶ decide the meaning and scope of a statute.¹⁴⁷ Of course,

142. See DOBBS ON TORTS, *supra* note 26, § 148; *see also* Galligan, *Primer*, *supra* note 29, at 1520-21 (noting that proof of these issues can be a presumption of negligence or evidence of some negligence in other jurisdictions).

143. *Dixie Drive It Yourself*, 137 So. 2d at 304-06.

144. *See id.*

145. *See id.*

146. Of course, in a jurisdiction where the violation of a statute is not negligence per se, the jury does have an opportunity to consider whether the violation of the statute was a violation of the standard of reasonable care, but only after the judge has considered questions one and two and determined that the jury can hear about and consider the statute. Put differently, the court considers questions one and two to decide if the statute is relevant in the case before the court. *See also infra* note 147 (discussing the difference between judge and jury functions in Louisiana violation of statute cases).

147. The statement in text must be qualified somewhat. The broad interpretation of class of persons is properly for the court. The broad interpretation of the class of risks is also appropriately for the court. But it is arguable whether a judge is in a better position than a jury to decide whether the scope of liability in a violation of statute negligence case includes or does not include the particular (and perhaps bizarre) manner in which the injury occurred. On this question, the common sense of the community may be just as reliable as a judicial determination of the scope of a statute, especially if the manner of occurrence was so idiosyncratic that it is most probable the legislature never thought about it. Notably, some courts include a proximate or legal cause element in their articulation of negligence in a violation of statute case. *See Rains v. Bend of the River*, 124 S.W.3d 580, 592-96 (Tenn. Ct.

that it is appropriate for a court to determine the scope of liability in a violation of statute negligence case does not mean that it is appropriate in every case. It does not mean it is appropriate for the court to consider scope of liability in a case where there is no statute.¹⁴⁸

One last observation on Justice Sanders' opinion is appropriate, and it relates to how a court decides the scope of liability. As noted above, Green believed that courts should decide the scope of liability based on several policy factors.¹⁴⁹ Justice Sanders' analysis of the scope of the statute at issue in *Dixie Drive it Yourself* does not appear to be driven by those policies.¹⁵⁰ The decision is very appropriately based upon Justice Sanders' interpretation of the statute.¹⁵¹ Critically, he noted, holding that the statute did not cover the risk that occurred (a wreck involving an inattentive driver) would have undermined the purpose of the statute.¹⁵² Implicit in his decision is the notion that, administratively, it is appropriate for the court to decide the scope and reach of statutes (as I noted above).¹⁵³ It is also implicit that the legislature was no doubt concerned with encouraging operators of broken-down cars to warn of the dangers associated with their stopped vehicles.¹⁵⁴ But Justice Sanders expressed none of that in his opinion; there was no express policy discussion. Rather, there was a very judicious discussion and interpretation of the relevant statute and its scope.

App. 2003). The jury's role in determining the so-called scope of the statute would seem most pronounced in a jurisdiction where the violation of statute is only some evidence of negligence, like in Louisiana. *Ducote v. Boleware*, 2015-0764, p. 14 (La. App. 4th Cir. 2/17/16); 216 So. 3d 934, 944; see Galligan, *Primer*, *supra* note 29, at 1509, 1520-21.

148. And in a jurisdiction like Louisiana, where the violation of a statute in a negligence case is not negligence per se but is some evidence of negligence, the judge, in answering questions one and two, is merely deciding whether the jury can even hear about the statute and its alleged violation. *Ducote*, 2015-0764 at pp. 13-18; 216 So. 3d at 943-44. That is, the court is merely deciding whether the statute is relevant in the tort case before it. See *id.* The jury ultimately decides whether there has been a breach of the standard of reasonable care and whether the scope of liability (risk) includes the injuries that occurred in the case before the court.

149. GREEN, JUDGE AND JURY, *supra* note 45, at 74-152.

150. Malone, *Dixie Drive It*, *supra* note 5, at 377.

151. See *Dixie Drive it Yourself Sys. New Orleans Co. v. Am. Beverage Co.*, 137 So. 2d 298, 304-06 (La. 1962).

152. *Id.* at 306.

153. See *id.* at 304.

154. See *id.* at 305-06.

B. Hill v. Lundin & Associates, Inc.

In the years after *Dixie Drive it Yourself*, Louisiana's intermediate appellate courts applied its Duty/Risk approach to cases arising under statutes and to negligence cases where no statute was involved.¹⁵⁵ The Louisiana Supreme Court would not clearly apply the Duty/Risk method of analyzing negligence cases to a case where there was no alleged statutory violation until ten years after *Dixie Drive It Yourself* when it decided *Hill v. Lundin & Associates, Inc.*¹⁵⁶ In *Hill*, the court considered a garden-variety negligence case in which there was no claimed violation of a statute, and it applied the Duty/Risk analysis.¹⁵⁷

In the aftermath of Hurricane Betsy, Baton Rouge scurried to repair itself before another storm hit.¹⁵⁸ Lundin & Associates was a home repair contractor and, in doing post-Betsy work, created a veritable assembly line of home repair.¹⁵⁹ A Lundin crew and truck would deliver materials and tools to a job site.¹⁶⁰ Later, workers would arrive by auto and do the required work.¹⁶¹ Thereafter, Lundin personnel would pick up what was left at the site.¹⁶² Ms. Delouise hired Lundin to make repairs to her home.¹⁶³ After Lundin made the repairs to the Delouise home, it left a ladder leaning up against the side of the house.¹⁶⁴ At some point thereafter, some unknown person removed the ladder from the side of the house and laid it in the Delouise yard.¹⁶⁵ There it remained for several days,¹⁶⁶ like the gun in Anton Chekhov's first act.¹⁶⁷

Celeste Hill worked as a housekeeper and babysitter for Ms. Delouise.¹⁶⁸ While on the job, Ms. Hill went outside the Delouise home to hang up the wash.¹⁶⁹ As she walked to the clothesline, she saw the

155. See Malone, *Dixie Drive It*, *supra* note 5, at 373-93.

156. 256 So. 2d 620 (La. 1972).

157. See *id.* at 621.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Ars. G., "IZ" VOSPOMINĖ OB" A.P. CHEKHOVIE [*Reminisces of A.P. Chekhov*], 28 Teatr i iskusstvo 520, 521 (1904) (Russ.) ("If in the first act you have hung a pistol on the wall, then in the following one it should be fired. Otherwise don't put it there.").

168. *Hill*, 256 So. 2d at 621.

169. *Id.*

ladder lying on the ground.¹⁷⁰ As she was hanging up the wash, she heard the door slam and saw her youngest charge, who was two or three years old, running toward her and the ladder.¹⁷¹ Alarmed, she hurried to save the child from falling over the ladder and in the process fell over the very ladder from which she was trying to save the child, suffering injury in the fall.¹⁷² The proverbial Chekhovian gun had fired.

Ms. Hill sued Ms. Delouise and Lundin, alleging negligence.¹⁷³ The trial court held that Ms. Delouise was not at fault and, without deciding whether Lundin was negligent, concluded that Hill was contributorily negligent, and her recovery was thus barred under the law at the time.¹⁷⁴ The court of appeal reversed as to Lundin, concluding it was negligent to leave a ladder at the site for several days and that it was foreseeable someone could be injured by the ladder. It also held that Ms. Hill was protected by the “momentary forgetfulness” doctrine that vitiated what would otherwise have been contributory negligence.¹⁷⁵

Lundin applied for writs, which the Louisiana Supreme Court granted.¹⁷⁶ Justice Barham wrote the opinion for the court.¹⁷⁷ He began his negligence analysis with cause-in-fact, concluding that Lundin’s leaving the ladder up against the side of the house was a cause-in-fact of the injury.¹⁷⁸ Clearly and properly, the court was following the Green/Malone prescription to treat cause-in-fact as a separate element of negligence.¹⁷⁹

Next, Justice Barham said “if the defendant’s conduct of which the plaintiff complains is a cause in fact of the harm, we are then required in a determination of negligence to ascertain whether the

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 622 (“If the defendant had not left the ladder on the premises, it could not have later been placed on the ground in the yard. To this extent it may be said that the defendant’s act had something to do with the harm.”).

179. *Cf.* GREEN, JUDGE AND JURY, *supra* note 45, at 186-95 (discussing issues with causation); GREEN, RATIONALE ON PROXIMATE CAUSE, *supra* note 12, at 132-41 (discussing and distinguishing causation); Malone, *Cause-in-Fact*, *supra* note 1 (discussing cause-in-fact as separate from proximate cause). Arguably, there was also a certain amount of logic to starting the analysis with cause-in-fact because if there is no factual causation, then there is really no need to go any further, but the same logic would not necessarily apply in a case tried to a jury. Would the jury decide cause-in-fact before the judge decided duty?

defendant breached a legal duty imposed to protect against the particular risk involved.”¹⁸⁰ As quoted, it is not entirely clear what Justice Barham meant. Was he saying that after cause-in-fact the court should decide breach? Or duty?

As he continued, it became clear that he meant that after cause-in-fact the court should consider the duty owed and its scope—scope of liability or risk.¹⁸¹ He said:

The basic question, then, is whether the risk of injury from a ladder lying on the ground, produced by a combination of defendant’s act and that of a third party, is within the scope of protection of a rule of law which would prohibit leaving a ladder leaning against the house.¹⁸²

Echoing Green’s skepticism about relying on foreseeability to determine proximate cause or scope of liability, Justice Barham opined that foreseeability is “not always a reliable guide, and certainly it is not the only criterion for determining whether there is a duty-risk relationship.”¹⁸³ One notes that in articulating that foreseeability was not the only factor in determining scope of liability, Justice Barham actually used the phrase “duty-risk.”¹⁸⁴ But what else besides foreseeability did Justice Barham see as relevant to the scope of liability determination? “The ease of association of the injury with the rule relied upon, however, is always a proper inquiry.”¹⁸⁵ The phrase “ease of association” is downright literary. It is evocative. What it means is less clear. Over the years, I have come to realize that it means that the court, in determining scope of liability, should consider how easily one would associate the risk, which arose, with the particular alleged negligent act.¹⁸⁶ That is, if the defendant was negligent—i.e., allegedly breached the duty to exercise reasonable care—to leave a

180. *Hill*, 256 So. 2d at 622. Interestingly, he cited two articles by Leon Green in addition to a Louisiana Supreme Court decision. *See id.* at 548; Leon Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42 (1962); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).

181. Most accurately, he did discuss breach but did not decide the question; he assumed that leaving a ladder leaning up against the side of a house might, under some circumstances, pose an unreasonable risk of harm. *Hill*, 256 So. 2d at 622.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* After this sentence Justice Barham cites WILLIAM PROSSER, *HANDBOOK OF THE LAW OF TORTS* 282ff (3d ed. 1964), but the phrase does not appear in Prosser. One of the footnotes on the cited page is a laudable reference to Leon Green and his notion that the real issue of proximate cause is a legal issue based on policy. *Id.* 282 n.2 (citing Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 621, 755 (1950)).

186. The so-called “rule of law.”

ladder leaning up against the side of a house; would a housekeeper/babysitter falling over the ladder after a third party had moved the ladder be one of the risks that come to mind?¹⁸⁷

What, in addition to ease of association, should the court consider in deciding scope of liability or scope of duty?

Where the rule of law upon which a plaintiff relies for imposing a duty is based upon a statute, the court attempts to interpret legislative intent as to the risk contemplated by the legal duty, which is often a resort to the court's own judgment of the scope of protection intended by the Legislature. Where the rule of law is jurisprudential and the court is without the aid of legislative intent, the process of determining the risk encompassed within the rule of law is nevertheless similar. The same policy considerations which would motivate a legislative body to impose duties to protect from certain risks are applied by the court in making its determination.¹⁸⁸

The paragraph merits some breaking down. Initially, in the first sentence, Justice Barham analogizes the garden-variety negligence case to the violation of statute negligence case.¹⁸⁹ In a violation of statute case the court asks questions one and two about class of persons and class of risks. Per Justice Barham, in a garden-variety case where the issue involves a jurisprudential "rule of law" the process is the same.¹⁹⁰ But, as noted above the idea of a jurisprudential rule of law is somewhat misleading because really what it translates to is the particular factual negligence the plaintiff alleged.¹⁹¹ Be that as it may, the court then, per Green, Malone, and *Hill*, should turn the plaintiff's particular alleged negligent act into a "rule of law" and decide whether that "rule of law" includes the risk that occurred in the case. I tell my class it is a sort of "write your own statute" exercise.

Clearly, per Barham, Green, and Malone, once the hypothetical statute or rule of law is hypothetically enacted (by the court?), then the judge decides the scope of liability in light of the relevant policies.¹⁹² While Justice Barham does not expressly list these policies, one might intuit that they are the same policies Green articulated as relevant to the scope of liability decision: the administrative factor, the ethical or moral factor, the economic factor, the prophylactic or preventive factor,

187. Of course, foreseeability might well sneak into this inquiry.

188. *Hill*, 256 So. 2d at 622-23 (citations omitted).

189. *Id.* at 622.

190. *Id.* at 623.

191. See, e.g., *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 105-06 (1934).

192. See *Hill*, 256 So. 2d at 623.

and the justice factor, including the capacity to bear the loss.¹⁹³ So then, what did the *Hill* court decide?

This defendant's alleged misconduct, its alleged breach of duty, was in leaving the ladder leaning against the house unattended. The risk encountered by the plaintiff which caused her harm was the ladder lying on the ground where it was placed by another, over which she tripped as she moved to protect the child. The record is devoid of any evidence tending to establish that the defendant could have reasonably anticipated that a third person would move the ladder and put it in the position which created this risk, or that such a "naked possibility" was an unreasonable risk of harm.

A rule of law which would impose a duty upon one not to leave a ladder standing against a house does not encompass the risk here encountered. We are of the opinion that the defendant was under no duty to protect this plaintiff from the risk which gave rise to her injuries. The plaintiff has failed to establish legal and actionable negligence on the part of the defendant.¹⁹⁴

First, one is struck by the fact that the core of the decision seems to be that there was no evidence that the defendant could have anticipated someone moving the ladder and placing it in the plaintiff's ultimate path.¹⁹⁵ Of course, "anticipated" is a synonym for foreseeable. Ironically, Justice Barham had earlier pointed out that foreseeability was not always a reliable guide to determine scope of liability.¹⁹⁶ Apparently, foreseeability was a sufficiently reliable guide for the decision in *Hill*. Second, a critic might also lament that the court did not undertake to meaningfully apply or explain the ease of association inquiry after introducing it.¹⁹⁷ The court might have indicated that one would associate the risk of someone, perhaps a child, falling off a ladder left leaning up against the side of a house, but not so much a phantom moving the ladder and someone tripping over it. Third, after noting that the determination of scope of liability involved a policy

193. See GREEN, JUDGE AND JURY, *supra* note 45, at 74-152. One commentator, McNamara, lists the following: "(1) ease of association, (2) administrative considerations, (3) economic considerations, (4) moral considerations, (5) type of activity, and (6) precedent or historical considerations." *Supra* note 86, at 1234.

194. *Hill*, 256 So. 2d at 623 (citations omitted) (quoting *Lanza Enters., Inc. v. Cont'l Ins. Co.*, 129 So. 2d 91, 94 (La. App. 3d Cir. 1961)).

195. See *id.*

196. See *id.* at 622.

197. Cf. *Jones v. Robbins*, 289 So. 2d 104, 107 (La. 1974) ("Particularly included within the risk of harm to others is the fact that, with the expectation of child group play, an easily associated risk is that some other incompetent, by reason of tender age, would misbehave or would misuse the gasoline.").

analysis, there is absolutely no policy analysis. Perhaps the lack of policy discussion or analysis is inevitable in a garden-variety negligence case, but if so, there are implications for the contention that the judge, rather than the fact finder, should decide scope of liability in a garden-variety negligence case. I will discuss these implications below. Fourth, whether the scope of liability would, in fact, always be a legal issue for the court, as Green and Malone contended,¹⁹⁸ was not crystal clear because, like *Dixie Drive It Yourself*, *Hill* was not a jury case.¹⁹⁹ It was tried by the court.

Happily, the court maintained the separation of cause-in-fact from scope of liability.²⁰⁰ And happily, the court did not resort to the mumbo jumbo words of proximate cause. For instance, Justice Barham did not say that Lundin leaving the ladder against the side of the house was not the proximate cause of Hill's injury because whoever moved the ladder and laid it down was an intervening cause, which rose to the level of a superseding cause, which broke the chain of causation.²⁰¹ Nor did the court rely upon the sequence of events or say that Lundin's negligence was "passive" or that the negligence of whomever moved the ladder was the "sole" proximate cause of Hill's injuries.

The analysis in *Hill* ended at the scope of duty or liability stage because there was no need to proceed.²⁰² But what if Justice Barham had concluded that the defendant's duty did include the risk that occurred? Then, presumably, the fact finder would have had to decide whether Lundin had breached the appropriate standard of care—had Lundin behaved unreasonably under the circumstances? Put differently, was there, or should there be, a "rule of law" that one should not leave a ladder leaning up against the side of a house?²⁰³ And, lastly, if the fact finders decided there was a breach, they would decide the damages issue.

We may chart the allocation of decision-making authority in a negligence case under Duty/Risk after *Hill* as follows:

198. See, e.g., GREEN, RATIONALE OF PROXIMATE CAUSE, *supra* note 12, at 76-77; Malone, *Cause-in-Fact*, *supra* note 1, at 72.

199. See *Hill*, 256 So. 2d at 621.

200. See *id.* at 622.

201. *Id.* at 622-23.

202. *Id.* at 623.

203. Louisiana courts have had a tendency since *Hill* to conflate duty and breach. See, e.g., *Pitre v. La. Tech Univ.*, 95-1466, 95-1487, pp. 9-22 (La. 5/10/96); 673 So. 2d 585, 590-96. That unfortunate tendency deserves fuller and separate treatment.

Element	Who Decides
Cause-in-Fact	Jury
Duty/Risk	Judge
Breach	Jury
Damages	Jury

With the decision in *Hill v. Lundin & Associates*, Duty/Risk was enshrined as “the” Louisiana approach to negligence, whether the case involved a violation of a statute or not. Under the Duty/Risk approach, cause-in-fact and scope of liability were separated. The judge would or should consider the relevant policies in making the Duty/Risk decision. And courts would concomitantly avoid the mumbo jumbo magic word approach to negligence that characterized the pre-Green/Malone approach to and analysis of negligence. Except perhaps for having the judge decide scope of liability, the future seemed bright.²⁰⁴

Sadly, the next Part will blunt the optimism *Hill* portended. It will discuss the post-*Hill* development of negligence analysis in Louisiana, the lack of policy analysis in most garden-variety negligence cases, and the inconsistency that has ensued. As noted, I once praised this inconsistency as “flexibility.”²⁰⁵ I was wrong. Dave Robertson, who urged a more consistent approach with the jury deciding scope of liability, was right.²⁰⁶ Now I am convinced. The consistent analytical, policy-based, transparent approach to negligence that *Hill* foreshadowed never materialized. And judges are not the appropriate institutional actor to decide scope of liability in a garden-variety fact-specific negligence case; juries are. Or in a non-jury trial—an increasingly common phenomenon—the judge should decide scope of liability, but as a mixed question of fact and law, not as a question of law. This point is crucial when a defendant moves for summary judgment²⁰⁷ contending that the defendant’s duty did not include the risk that occurred.

204. And there are still cases applying the *Hill* formula and its allocation of decision-making responsibility. See, e.g., *Pardue v. AT&T Tel. Co.*, 2001-0762, pp. 2-5 (La. App. 3d Cir. 10/31/01); 799 So. 2d 710, 712-14.

205. Galligan, *Cats or Gardens*, *supra* note 20, at 35; Galligan, *Revisiting the Patterns of Negligence*, *supra* note 20, at 1132.

206. See, e.g., Robertson, *Allocating Authority*, *supra* note 19, at 1102-05. Or, in a case with no jury, the judge as fact finder should decide scope of liability. But that decision is not law; it is a mixed question of fact and law with no precedential value.

207. FED. R. CIV. P. 56; LA. CODE CIV. PROC. art. 966 (2020).

If scope of liability is properly a mixed question of fact and law, then judges should not grant summary judgment if there are material facts concerning the scope of the defendant's liability (or duty) and reasonable minds could find that the indicated risk was within the scope of liability as a basic question of fairness or common sense.²⁰⁸ The court should not turn the scope of liability determination into a question of law at the summary judgment phase and either ignore or decide critical factual issues. Doing so misallocates decision-making authority and creates what looks like legal decisions that litter and confuse the landscape of Louisiana tort law. If there are factual²⁰⁹ issues concerning the scope of liability, the question is not appropriate for resolution at the summary judgment stage. If there are no factual questions, the court should grant summary judgment on the scope of liability question, not the duty question.

V. DUTY/RISK DERAILED

The purpose of this Part is not to exhaustively review post-*Hill v. Lundin & Associates, Inc.* negligence law in Louisiana. Rather, it is to point out broad trends and to point out how the Duty/Risk method of analysis has not, in some ways, fulfilled its promise. In this Part, I show that courts have not consistently articulated policy bases of their decisions when deciding scope of liability or scope of duty.²¹⁰ The failure to analyze and discuss policy in such cases is because the results in garden-variety negligence cases generally turn on case-specific fairness, not policy. Thus, fact finders, not judges, are the appropriate institutional actors to determine scope of liability or risk.

A. *The Promise of Fact-Specific Policy Analyses Was Illusory*

Green and Malone contended that courts deciding scope of liability or scope of duty had to make a policy choice about the scope of the "rule" upon which the plaintiff relied.²¹¹ As noted above, Green articulated the relevant policies: the administrative factor, the ethical or moral factor, the economic factor, the prophylactic or preventive factor,

208. See FED. R. CIV. P. 56; LA. CODE CIV. PROC. art 966(A)(3).

209. Including mixed questions of fact and law.

210. The Louisiana Supreme Court has said that it would make tort decision "in light of all [the] relevant moral, economic, and social considerations," *Entrevia v. Hood*, 427 So. 2d 1146, 1147 (La. 1983) (determining whether something posed an unreasonable risk of harm), and sometimes, but certainly not always, did not apply those factors.

211. See, e.g., Malone, *Dixie Drive It*, *supra* note 5, at 363-64.

and the justice factor, including the capacity to bear the loss.²¹² There are several excellent Louisiana Supreme Court opinions discussing these general tort policies, and some of these cases are discussed below in the proposal Part. However, it is important to note that those Louisiana decisions, for the most part, involve cases and rules dealing with “whole categories of claimants or . . . claims,”²¹³ not cases dealing with discrete, isolated allegations of negligent conduct.

In cases involving more discrete, less categorical claims, it is not uncommon to see little or no analysis of the policies Green identified as critical. I have come to believe this is inevitable as grand policy often has little or no role to play at the fact-specific level of determining whether it is fair to hold someone liable for injuries they have factually caused. For instance, in *Jones v. Robbins*, the defendant sold or gave a small amount of gasoline to a six-year-old child.²¹⁴ A group of children, including the direct recipient of the gas, played with the gasoline, pretending to have paint on their hands and washing their hands with the gasoline.²¹⁵ About one and one-half hours after the six-year-old obtained the gas, her four-year-old half-sister, with a match in hand, came upon the scene of the playing children.²¹⁶ The four-year-old struck the match, threw it into the gasoline, was subsequently engulfed in flames, and suffered injury.²¹⁷ Her father sued the owner and manager of the store where the six-year-old had obtained the gas.²¹⁸ The trial court held for the defendants and the court of appeal affirmed.²¹⁹ The Louisiana Supreme Court reversed.²²⁰

In *Jones*, Justice Barham, the author of *Hill*, again began the analysis with cause-in-fact, concluding that the defendant was a cause-in-fact of the plaintiff’s injuries.²²¹ Then, he turned to duty, breach, and scope of duty.²²² On the duty and breach questions he said:

As a general statement, it may be said that the vendor of gasoline has the duty not to place it in the hands of those who, by reason of age or other

212. GREEN, JUDGE AND JURY, *supra* note 45, at 74-152.

213. Pitre v. La. Tech Univ., 95-1466, 95-1487, p. 1 (La. 5/10/96); 673 So. 2d 585, 596 (La. 1996) (Lemmon, J., concurring).

214. 289 So. 2d 104, 106 (La. 1974).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 105-06.

219. *Id.* at 108.

220. *Id.*

221. *Id.* at 106.

222. *Id.* at 106-08.

disabilities, are unaware of the special propensities of the material, and of the precautionary measures which must be taken when using or storing it. Under the particular facts of this case, when a six year old child comes alone to a service station attendant and procures gasoline, without any adult solicitation or any adult supervision, it may be said that the attendant has breached a duty imposed by a standard of care owed to at least the one to whom he has dispensed the gasoline.²²³

Turning to scope of duty, Justice Barham asked whether the duty not to provide gasoline to a six-year-old child encompassed the risk her four-year-old half-sister would suffer burn injuries.²²⁴

The court concluded that the duty not to provide gasoline to an underage person included the risk that had occurred in the case.²²⁵ Why? Because children play together, and thus the risk of injury from fire was easily associated with the duty.²²⁶ Moreover, while he did not use the word, he essentially concluded that the occurrence was foreseeable.²²⁷ What policy analysis was there?

The duty not to place gasoline in the hands of an unsupervised incompetent six year old was designed not only to protect that child, but also to protect those whom she would likely expose to the danger of the highly flammable substance. Moreover, it included the risk that another incompetent of tender age might engage in an activity of misuse which would actually ignite the gasoline and create the harm which the four year old Candy here suffered.²²⁸

The opinion does not expressly consider any of the policies which Green contended should be at the heart of the scope of duty analysis.²²⁹ Arguably, the opinion hints at notions of deterrence—the law should deter adults from providing dangerous substances to children—²³⁰ but the opinion did not expressly articulate or apply any of Green's

223. *Id.* at 107. Interestingly, he analyzed duty and breach before scope of duty; whereas in *Hill* he conflated the duty and scope of duty questions. See *Hill v. Lundin & Assocs.*, 256 So. 2d 620, 622-23 (La. 1972). Thus, in *Jones* he essentially switched the order of analysis, which phenomenon I will discuss below.

224. *Jones*, 289 So. 2d at 107-08.

225. *Id.* at 108.

226. *Id.* at 107.

227. *Id.* at 107-08 (holding that the risk was “totally within the range of the attendant’s realization of the consequences of his act”).

228. *Id.* at 108. Interestingly, the dissent relies on pre-Greenian proximate cause concepts like “shifting the responsibility” to the mother of the child and the passage of time between the provision of the gas and the burn injuries. *Id.* at 108-10 (Summers, J., dissenting).

229. For a poetic take on *Jones*, see Thomas E. Richard, *Jones v. Robbins: The Rhyme and Reason of Duty-Risk*, 74 LA. L. REV. 839 (2014).

230. See *Jones*, 289 So. 2d at 107-08.

policies. Nor does it plumb in-depth policies related to who should be responsible for supervision and oversight of children, although an analysis of that issue would once again seem to turn on the particular facts of the particular case before the court.

Likewise, in *Gresham v. Davenport*, a fifteen-year-old girl, who lived with her father, hosted a party at her father's house.²³¹ At the party, she served beer to her guests, including her sixteen-year-old boyfriend.²³² Neither young person was a "novice to beer drinking."²³³ Over the course of the evening, the young man drank ten beers.²³⁴ On the way home, the boyfriend, who was not driving, grabbed the wheel of the car in which he was traveling in order to avoid hitting some mailboxes.²³⁵ Consequently, the driver lost control of the car.²³⁶ The driver was killed and two other passengers suffered serious injuries in the ensuing collision.²³⁷ The parents of two of the victims sued the girl's father and his insurers, among others.²³⁸

One of the questions the court considered was whether the girl owed a duty not to serve beer to her boyfriend.²³⁹ The court doubted that the girl had a duty not to serve beer to her boyfriend.²⁴⁰ But, even if a duty was owed:

the particular risk encountered by serving beer to [the boyfriend], a passenger in a vehicle, that he would grab the steering wheel and cause an accident cannot be easily associated with [the girlfriend's] conduct in providing the beer. Moreover, there is no indication that such a risk was within the legislative intent in passing the statute prohibiting a minor from purchasing alcoholic beverages. Therefore, the particular risk was not within the scope of whatever duty that [the girlfriend], a minor herself, might have owed to [her boyfriend].²⁴¹

That is the extent of the analysis. There was no ease of association between any duty owed and the risk that occurred; what happened was apparently just too bizarre.²⁴² But that does not seem like a legal

231. 537 So. 2d 1144, 1144 (La. 1989).

232. *Id.* at 1144-45.

233. *Id.* at 1147.

234. *Id.* at 1145-46.

235. *Id.* at 1145.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 1147.

240. *Id.*

241. *Id.* at 1147-48.

242. *See id.*

determination. It seems like a mixed question of law and fact and is totally fact-specific.²⁴³ Once again, the opinion, when considering scope of the duty, does not undertake or express any analysis of policy at all.

Roberts v. Benoit,²⁴⁴ particularly on rehearing, exemplified the same trend of little or no analysis of the core policies of tort law. Benoit was a cook working for the Orleans Parish Sheriff's Office.²⁴⁵ The Sheriff commissioned the kitchen workers as deputy sheriffs in order to make them eligible for state supplemental pay.²⁴⁶ Before commissioning the workers, the sheriff provided a training course, which included eight hours of firearms training.²⁴⁷ During the training, the instructor told the future (kitchen-based) deputies "that while off duty, it was better to have a gun and not need it than to need a gun and not have it."²⁴⁸ The instructors also provided the prospective deputies with departmental regulations that they should not have a gun on their person when consuming alcohol.²⁴⁹

After commissioning, Benoit, who had been drinking, went to Roberts' home to have Roberts repair his car. While at Roberts' home, Benoit took a .38 revolver out of its holster and began playing with it for a forty-five-minute period, including cocking and uncocking the gun.²⁵⁰ Roberts asked Benoit to put the gun away several times. Benoit did not comply.²⁵¹ Thereafter, the revolver discharged, seriously injuring Roberts.²⁵² Roberts sued Benoit, the Sheriff, and others.²⁵³

The case involved issues of potential vicarious liability and negligent hiring, commissioning, and training.²⁵⁴ It wound its way up to the Louisiana Supreme Court.²⁵⁵ The court, in its first opinion by

243. And if one focused on the broad risks of drunken underage children doing all manner of stupid and dangerous things, perhaps the general risk of tragic mayhem includes the particular, bizarre behavior of grabbing a steering wheel. I would leave that up to lawyers to argue and juries to decide, and each case would stand on its own facts.

244. 605 So. 2d 1032 (La. 1992).

245. *Roberts v. Benoit*, 605 So. 2d 1032, 1035 (La. 1991), *on reh'g*, 605 So. 2d 1032 (La. 1992).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* Apparently, it was better to not have a gun when one needed it if one had been drinking than to have a gun when one needed it if one had been drinking.

250. *Id.* at 1035-36.

251. *Id.* at 1036.

252. *Id.*

253. *Id.* at 1035.

254. *Id.* at 1036.

255. *Id.*

Justice Hall, considered the law related to negligent hiring in other jurisdictions and expressly recognized the tort of negligent hiring in Louisiana.²⁵⁶ But, was the risk, which occurred, within the scope of the duty? Echoing Green, Justice Hall said:

There is no “rule” for determining the scope of the duty. Regardless if stated in terms of proximate cause, legal cause, or duty, the scope of the duty inquiry is ultimately a question of policy as to whether the particular risk falls within the scope of the duty. . . . These cases require logic, reasoning and policy decisions be employed to determine whether liability should be imposed under the particular factual circumstances presented.²⁵⁷

Justice Hall then stated that the court found that the ease of association between the duty to properly train deputies and the injuries, which occurred, and the manner in which they occurred was “attenuated.”²⁵⁸ There was no requirement that Benoit carry a firearm even if it was encouraged; Benoit’s carrying the gun while drinking violated the Sheriff’s regulations; and Benoit’s engaging in horseplay with the revolver, while intoxicated, violated common sense.²⁵⁹ Nor was there anything in Benoit’s background or experience to predict what occurred; thus, the incident was not foreseeable to the Sheriff.²⁶⁰ Moreover, Benoit met Roberts in a purely personal capacity; it was not related to his employment.²⁶¹ Justice Hall concluded his analysis by saying:

After carefully delineating the duty, it is evident that the primary purpose for imposing the duty to exercise reasonable care in hiring, commissioning and training deputies is to ensure effective and efficient law enforcement, and also to protect the public from injury caused by a deputy’s negligent use of firearms while engaged in his law enforcement duties. The risk that a deputy while off duty and under no requirement to carry a gun would engage in horseplay with a loaded revolver while intoxicated, an action in violation of the Sheriff’s regulations, and cause injury to plaintiff is clearly outside the ambit of protection contemplated by the imposition of that duty.²⁶²

256. *Id.* at 1038-40, 1043-44.

257. *Id.* at 1044-45.

258. *Id.* at 1045.

259. *Id.*

260. *Id.*

261. *Id.* at 1046.

262. *Id.*

The quote reveals a concern for deterrence—to deter the police from negligent use of firearms when engaged in law enforcement activities.²⁶³ The rest of the analysis described above is common sense logic, not policy.²⁶⁴ And the decision was fact-dependent: the fact the Sheriff did not require Benoit to carry a gun; the fact Benoit violated a regulation by carrying a firearm when intoxicated; the stupidity of playing with a loaded gun while drunk; and the lack of foreseeability are unique to the case.²⁶⁵

There were three spirited dissents from the court's first opinion in *Roberts*, and the court granted rehearing.²⁶⁶ On rehearing, Justice Cole wrote the opinion of the court.²⁶⁷ Justice Cole began as a true believer in Duty/Risk, noting:

Defining legal or proximate cause has proved to be a herculean task for the judiciary in all places and all times. The very term “proximate cause” is fraught with confusion, as it has nothing to do either with cause or proximity. Moreover, it is not to be mistaken for cause-in-fact, as the two elements satisfy entirely different functions in the negligence analysis.²⁶⁸

Then, after a historical discussion of proximate cause and Duty/Risk,²⁶⁹ Justice Cole turned to the case before the court and said:

In our original opinion we stated the sheriff has a duty to commission as deputies only competent law enforcement officers. Upon reconsideration, we find that the duty implicated by this case is actually much narrower, *viz.*, the duty not to promote a cook to deputy in name alone, that is, not to engage in ersatz promotions.²⁷⁰

The purpose of that duty was not to protect against personal injury but to protect the public fisc.²⁷¹ Interestingly, as Justice Cole continued, he began to shift terms and call the scope of duty issue a “legal cause” issue.²⁷²

In subsequently defining the issue and denying recovery, Justice Cole wrote:

263. *See id.*

264. *See id.*

265. *See id.*

266. *See id.* at 1046-50.

267. *Roberts v. Benoit*, 605 So. 2d 1032, 1050 (La. 1992).

268. *Id.* at 1052.

269. *Id.* at 1052-54.

270. *Id.* at 1054.

271. *Id.*

272. *Id.*

In this case, the inquiry becomes whether the duty not to promote a cook to deputy, in name only, is meant to protect the class of claimants, of which plaintiff is a member, from the risk that the cook will: acquire, of his own accord, the trappings of a deputy; while off-duty, become intoxicated; play games with his loaded gun; and, in the process, inadvertently shoot someone. We do not think the duty encompasses such a far-flung hazard, dependent as it is on the unpredictable and idiosyncratic foibles of one person. While it is not necessary that the exact risk encountered be foreseeable, it is unrealistic to expect the sheriff, who promoted Benoit simply to put him on the supplemental pay rolls, could have expected any harm to result from this maneuver. The facts indicate that what little training Benoit received, he received as a matter of form alone.²⁷³

The reader will note how incredibly fact specifically Justice Cole articulated the scope of duty or legal cause (Duty/Risk) question.²⁷⁴ The reader will also notice that the ultimate basis for the no liability determination was that the incident, as it occurred, was unforeseeable.²⁷⁵ Continuing, Justice Cole emphasized the “fact-intensive nature of the duty-risk analysis.”²⁷⁶ The opinion, whether one agrees with the result or not, is a fine example of traditional legal reasoning. Justice Cole, as Justice Hall had done in the original opinion, reviewed the jurisprudence and attempted to garner and hone the reach of the duty to train. But there is a noteworthy absence of any express analysis of “policy” as Green defined it.

In *Cay v. State Department of Transportation & Development*, a man, wearing black, who had been drinking, and who was walking on a bridge with traffic at his back at night, fell to his death.²⁷⁷ His survivors sued the state, claiming that the state breached its duty to exercise reasonable care because it had not designed the height of the bridge guardrail to the height required by law for bridges on which pedestrians traveled.²⁷⁸ While there were no witnesses to the fall and no signs a vehicle had hit decedent, the most plausible inferences were that a car coming up behind him had scared him and that, in an intoxicated state, he had staggered and fallen over the low guardrail.²⁷⁹

273. *Id.* at 1054-55.

274. *See id.*

275. *See id.*

276. *Id.* at 1055.

277. 93-0887 (La. 1/14/94); 631 So. 2d 393, 394.

278. *Id.* at 395.

279. *Id.* at 397.

In a careful and typically clear opinion, Justice Lemmon considered, among other issues, the scope of duty issue. He discussed the general risk at issue and concluded: “There is an ease of association between an accidental fall over the railing of a bridge and the failure to build the railing to a height above an average person’s center of gravity.”²⁸⁰ The opinion is sensible and unassailable, but, once again, there is no discussion of Greenian policy. Interestingly, the court did reallocate fault from 60% to the defendant and 40% to the decedent to 10% to the defendant and 90% to the decedent.²⁸¹ Thus, the opinion is, in part, about the role of liability, victim fault, and the impact of comparative negligence after its adoption.²⁸²

In the twenty-five years since these decisions, the courts continue to state that the scope of duty question is fact-specific and, at the same time, that it is a policy decision.²⁸³ But the courts, in deciding the scope

280. *Id.* at 399.

281. *Id.*

282. That is, rather than find no liability to an at fault victim through the Duty/Risk method, the court found liability but allocated the lion’s share of the fault to the decedent.

283. See, e.g., *Rando v. Anco Insulations, Inc.*, 2008-1163, 2008-1169, pp. 38-40 (La. 5/22/09); 16 So. 3d 1065, 1092-93; *Chaisson v. Avondale Indus., Inc.*, 2005-1511, pp. 24-26 (La. App. 4th Cir. 12/20/06); 947 So.2d 171, 188-89; *Conerly v. State ex rel. La. State Penitentiary*, 2002-1852, pp. 11-12 (La. App. 1st Cir. 6/27/03); 858 So. 2d 636, 646-47; *Perkins v. Entergy Corp.*, 98-2081, 98-2082, 98-2083, pp. 30-35 (La. App. 1st Cir. 12/28/99); 756 So. 2d 388, 409-13; *Pinsonneault v. Merchs. & Farmers Bank & Tr. Co.*, 99-12, pp. 13-22 (La. App. 3d Cir. 7/21/99); 738 So. 2d 172, 181-86 (discussing thoroughly jurisprudence, the facts, and logic but without a “Greenian” policy analysis); *Nicholson v. Calcasieu Par. Police Jury*, 96-314, pp. 6-7 (La. App. 3d Cir. 12/11/96); 685 So. 2d 507, 511-12; *Rhodes v. State ex rel. Dep’t of Transp. & Dev.*, 94-1758, pp. 12-13 (La. App. 1st Cir. 12/20/96); 684 So. 2d 1134, 1144; *Freeman v. Julia Place Ltd. Partners*, 95-0243, pp. 4-6 (La. App. 4th Cir. 10/26/95); 663 So. 2d 515, 518-19 (foreseeability); cf. *Cornier v. T.H.E. Ins. Co.*, 98-2208, p. 9 (La. 9/8/99); 745 So. 2d 1, 8-9 (noting that liability on the state would create too onerous a burden); *Phillips v. G & H Seed Co.*, 2010-1405, p. 12 (La. App. 3d Cir. 5/11/11); 66 So. 3d 507, 515 (quoting FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *LOUISIANA TORT LAW* 132-33 (1996)) (noting the policies at issue in an economic harm negligence case). Sometimes the court has taken a more middle of the road approach between a fact-specific inquiry and a policy analysis. For instance, in *Maw Enterprises LLC v. City of Marksville*, the court considered whether a city’s duty to provide a retail alcohol beverage permit to a qualified applicant encompassed the risk that the applicant’s lessor would suffer economic loss if the city improperly denied the lessee-applicant a permit and thereby harmed the business. 2014-0090, p. 2 (La. 9/3/14); 149 So. 3d 210, 212-13. After first considering whether the city had a duty under the applicable state alcohol laws, the court considered whether the city had a duty under LA. CIV. CODE art. 2315 (2020). *Id.* at p. 11-19, 149 So. 3d at 217-22. In holding the duty did not encompass the risk, the court phrased the duty and scope of duty question in a fact-specific manner. *Id.* at p. 17, 149 So. 3d at 221. In concluding there was not liability, the court noted the case-specific facts but also referred generally to “moral, social, and economic values.” *Id.* at p. 18, 149 So. 3d at 221-22. Then, it rather summarily uttered concerns about unlimited liability to an unlimited number and articulated hypothetical concerns about liability for employees losing their jobs and damage to suppliers. *Id.* at p. 18-19, 149 So. 3d at 222 (quoting PPG Indus., Inc.

of the duty or risk, do not typically discuss the administration of justice or the judicial role, the ethical or moral factor—other than a pure sense of fairness, deterrence, or the capacity to bear the loss.²⁸⁴ A 2017 Louisiana Fourth Circuit Court of Appeals decision evincing this reality is *Chanhasalo v. Deshotel*.²⁸⁵

Deshotel rear-ended Chanhasalo on the interstate; the parties subsequently pulled over to inspect the damage and to report the

v. Bean Dredging, 447 So. 2d 1058, 1061 (La. 1984)). It then referred to its “policy” decision in the case. *Id.* Notably, there was no empirical evidence offered for the court’s economic concerns. *See id.*

284. *See, e.g.,* Cleco Co. v. Johnson, 2001-0175, p. 7 (La. 9/18/01); 795 So. 2d 302, 307 (“If it is foreseeable that damage to electrical lines could cause a power outage and a resulting automobile accident, a trier of fact may conclude that it is foreseeable that such damage could cause a power surge which would harm electrical customers’ equipment.”); Carpenter v. Foremost Signature Ins. Co., 47,008, pp. 8-9 (La. App. 2d Cir. 2/29/12); 87 So. 3d 264, 269 (holding that interruption of water service was not the legal cause of fire damage three days later); Bruno v. Davis, 2009-928, p. 3 (La. App. 3d Cir. 2/24/10); 31 So. 3d 633, 635 (“Although the exact manner in which Plaintiff came to harm may not have been foreseeable, it was, and is obvious that an elderly person lying quietly in bed might be suddenly confused and disoriented by a vehicle crashing into her house. The particular harm which befell Plaintiff, while unusual, can be reasonably said to be associated with the sudden event caused by the chain of events that resulted from Richard Davis’ negligence in operating his vehicle.”); Stephenson v. Commercial Travelers Mut. Ins. Co., 2004-1237, pp. 8-10 (La. App. 3d Cir. 2/2/05); 893 So.2d 180, 186-87 (holding that any duty a school and its soccer coach owed to prevent a player from participating in a soccer match because of left ankle injury, which was properly braced, did not include the risk that the player would sustain injury to her right leg because of an unsuccessful maneuver by an opposing player); Franz v. LeDoux, 2003-2080, p. 5 (La. App. 4th Cir. 2/4/04); 869 So. 2d 137, 140-41 (holding that there was no ease of association between a fall from a piece of exercise equipment and a motor vehicle accident one month later); Pardue v. AT&T Tel. Co., 2001-0762, p. 5 (La. App. 3d Cir. 10/31/01); 799 So. 2d 710, 713-14 (quoting Todd v. State ex rel. Dep’t of Soc. Servs., 96-3090, p. 7 (La. 9/9/97); 699 So. 2d 35, 39) (holding that there is no ease of association between alleged negligent maintenance of a power line and a squirrel gaining access to a transformer causing a power outage which damages plaintiff’s cordless phone); Barr v. Jacobson, 34,975, p. 5 (La. App. 2d Cir. 9/28/01); 795 So. 2d 1244, 1247 (holding that the danger of stepping into holes located off of the roadway while embarking on a second trip to observe other vehicles or persons involved, out of curiosity or personal interest, six or seven minutes after the accident, is simply not within the scope of this duty).

285. 2017-0521 (La. App. 4th Cir. 12/27/17); 234 So. 3d 1103; *see also* Cleco, 2001-0175, p. 7; 795 So. 2d at 307 (holding that a dump truck driver’s duty to not negligently back into a utility pole included the risk that customers of the utility would suffer damage to their electrical appliances as the result of a power surge by relying upon foreseeability and case analysis with no discussion of policy); LeBlanc v. Stevenson, 2000-0157, p. 5 (La. 10/17/00); 770 So. 2d 766, 771 (detailing a sad tale of two men trying to get a truck out of the mud, an amputated finger, and no discussion of policy); Todd, 96-3090 at p. 17; 699 So. 2d at 43-44 (relying upon foreseeability in concluding that the risk an eleven-year-old boy would commit suicide at his father’s house after being removed from his mother by the Department of Social Services during an investigation into child abuse initiated by teachers of the decedent who saw bruises on him was not within the scope of the State’s duty to conduct an investigation of the matter).

accident to the police.²⁸⁶ Approximately five to fifteen minutes later, another party rear-ended another car as they passed by the site of the initial accident.²⁸⁷ Those two cars then struck both Chanthasalo and Deshotel.²⁸⁸ Chanthasalo sustained serious injuries as a result of the second accident.²⁸⁹ He sued Deshotel, among others.²⁹⁰ Chanthasalo contended that Deshotel's alleged substandard conduct was the cause of the injuries he suffered as a result of the second accident.²⁹¹ Deshotel's insurer filed a motion for summary judgment in which it contended that the scope of duty owed by Deshotel to Chanthasalo did not extend to the remote possibility that he might be struck by a vehicle in a separate, unrelated accident.²⁹²

The trial court granted the motion, and the Fourth Circuit affirmed.²⁹³ The court very appropriately discussed the reasons why drivers should not follow too closely and the risks that following the car ahead entails.²⁹⁴ It then concluded by stating:

[W]e find no ease of association between Accident No. 1 and Accident No. 2. . . . The duty Ms. Deshotel owed to Mr. Chanthasalo from the first accident—not to follow too closely and drive at a safe speed—did not extend to cover him for the risk of injury from an unrelated second accident.²⁹⁵

It is a classic Duty/Risk decision based on common sense and a purposeful analysis of the rule—not to follow too closely—and the reason for the rule. It is also extremely fact-specific, and it is not an analysis of the “policies” of tort law. For what policies, other than basic fairness, are at play in such a case? None.

B. Scope of Liability in a Particular Case Is About Fairness, Not Policy, and It Is a Mixed Question of Fact and Law for the Fact Finder; It Is Not a Question of Law for the Court

If it appears that I am being critical of the opinions described in the previous subpart, let me clarify. Many of them are technically and

286. *Chanthasalo*, 2017-0521 at p. 1; 234 So. 3d at 1105.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at p. 2, 234 So. 3d at 1105.

291. *Id.*

292. *Id.*

293. *Id.* at pp. 3, 12; 234 So. 3d at 1106, 1111.

294. *Id.* at pp. 9-10; 234 So. at 1109-10.

295. *Id.* at p. 10, 234 So. 3d at 1110.

analytically excellent opinions. They discuss jurisprudence; they are purposive in analyzing the reason for the so-called “rules of law” or conduct they consider. They are logical. Some of them are fine examples of judicial reasoning at its best. All that praise aside, they do not expressly articulate, analyze, and apply the policies that Leon Green argued were at the core of determining the scope of liability or duty in a torts case.²⁹⁶ Indeed, there may be a very good reason the courts often do not discuss Green’s policies.

As my friend and colleague, torts Professor Martha Chamallis commented to me at a conference at which both of us were about to present on the subject of this Article: The courts say their decisions are based on policy, but is policy really the basis of decision in a garden-variety Duty/Risk case? It does not seem so. She is exactly right. When one considers whether the defendant ought to be liable to the particular plaintiff before the court for the particular risk, which arose in the particular manner in which it arose, the grand policies of torts are not at issue. What is at issue is a basic notion of fairness. Arguably, the most important thing is to achieve the right result in the case before the court on the facts before the court. Concerns that a particular result based on the unique facts of a particular case (as opposed to a decision involving broad categories of plaintiffs, defendants, and risks) are going to adversely impact the world seem unfounded and are never in my experience supported by empirical evidence. The question is, based on the unique facts and the credibility of the witnesses, should the defendant be liable for this risk? The decision turns on the particular facts, on the potential bizarreness of the events, and on the community’s case-specific notion of justice. It is not about broad notions of the administration of justice or the judicial role or ethical or moral factors or deterrence or the capacity to bear the loss. It is about a pure sense of fairness.

Moreover, the case-specific decision on scope of liability has no impact on the “law” of torts or the outcome of a future case. The results are idiosyncratic and applicable only to the case decided. For instance, in *Hill*, the no liability decision is limited to that case. No one would seriously argue that, after *Hill*, the “law” in Louisiana was that someone who left a ladder leaning up against the side of a house, after making hurricane repairs, was never liable, or never owed any duty, to someone who fell over the ladder when it was moved from the side of the house

296. See GREEN, JUDGE AND JURY, *supra* note 45, at 74-152.

to the ground by an unknown third-party.²⁹⁷ And no one would contend that any policies were at stake beyond a rough sense of justice arising out of the particular circumstances.

After *Gresham*, no one would suggest that the “law” in Louisiana was that a minor who served alcohol to other minors was never not liable where one of the minors to whom alcohol was served grabbed the wheel of a car in which he was a passenger, causing a wreck resulting in serious injury.²⁹⁸ The decision was not law, and it was not broadly based on policy. It was a decision based on the bizarre turn of events and circumstances.

In *Roberts*, the court in its initial hearing did state a legal rule—Louisiana recognized the tort of negligent hiring—but then it held that the connection between the failure to exercise reasonable care in hiring and training and the resulting injuries before the court were too “attenuated” to impose liability.²⁹⁹ Recognizing the tort of negligent hiring was a legal decision, it was applicable to other cases. But, whether the duty not to negligently hire or train included the particular risk that occurred in the case was not law; it was fact-specific. Indeed, consistently with one of the messages of this piece, Justice Hall said, “There is no ‘rule’ for determining the scope of the duty.”³⁰⁰ Then, on rehearing, the court narrowed its recognition of the tort of negligent hiring when Justice Cole said, “[W]e find that the duty implicated by this case is actually much narrower [than originally articulated;] the duty not to promote a cook to deputy in name alone, that is, not to engage in ersatz promotions.”³⁰¹ That was a much more case-specific statement of any duty owed. And while the court noted that the narrower duty’s purpose was protecting the public fisc, rather than protecting against personal injury,³⁰² its ultimate resolution had a most limited, if any, impact on future cases.

The *Cay* decision, typical for Justice Lemmon, was clear, elegant in its direct style, and sensible. But the end result—that the duty to build guardrails of sufficient height to protect pedestrians included the risk that an intoxicated person, dressed in dark clothes at night, walking with traffic rather than against it, would become surprised or scared by

297. See *Hill v. Lundin & Assocs. Inc.*, 256 So. 2d 620 (La. 1972).

298. See *Gresham v. Davenport*, 537 So. 2d 1144 (La. 1989).

299. *Roberts v. Benoit*, 605 So. 2d 1032, 1044-45 (La. 1991), *on reh’g*, 605 So. 2d 1032 (La. 1992).

300. *Id.* at 1044.

301. *Id.* at 1054.

302. *Id.*

a car coming up from behind him and fall to his death—was case-specific.³⁰³ It was not law, and policy was not really involved. It was about fairness and the interplay of liability, victim fault, and the impact of comparative negligence.

Finally, the decision in *Chanhasalo* was based on the particular facts and the time span between the initial accident and the second collision.³⁰⁴ It is not now Louisiana law that rear-ending someone, which causes the two involved cars to stop, does not result in liability to the rear-ending driver where a subsequent rear-end collision happens five to fifteen minutes later.³⁰⁵ It is, as the Romans said, *sui generis*. The decision was not policy-based. In fact, there would be nothing to prevent a lawyer in a subsequent case, with remarkably similar facts, from arguing that people driving by an accident often slow down and look—i.e., “rubber neck.” Therefore, the lawyer in the future case might argue that the duty to avoid a rear-end collision does include the risk that someone will slow down to look at the results of that collision and that a driver following the rubbernecker will also rubberneck, but not slow down, will collide with the first rubbernecker, and will wreak further havoc for the victim of the first collision.

None of the cases discussed above turned on policy at a level beyond pure case-specific fairness or “ease of association.” And none of them resulted in “law” or a “rule” applicable to future cases. Recall Justice Hall’s admonition that there is no rule for determining scope of duty.³⁰⁶ Wex Malone apparently would have agreed. In a wonderful article he wrote about *Dixie Drive It Yourself*,³⁰⁷ Wex Malone noted that after *Dixie*, lawyers had urged that the “rule” of *Dixie* was that courts must ignore the “intervening wrongdoing”³⁰⁸ of a third person in any case “against a defendant whose original negligence set the stage for the ensuing accident.”³⁰⁹ In response, in the last sentence of the article, Malone tellingly refuted that contention and wrote, “[T]he *Dixie* decision represents exclusively an approach or a method of attack;

303. See *Cay v. State Dep’t of Transp. & Dev.*, 93-0887 (La. 1/14/94); 631 So. 2d 393; see also *Broadnax v. Foster*, 47,079, p. 8 (La. App. 2d Cir. 4/11/12); 92 So. 3d 427, 433 (“The extent of protection owed by a defendant to a plaintiff is made on a case-by-case basis to avoid making a defendant an insurer of all persons against all harms.”).

304. See *Chanhasalo v. Deshotel*, 2017-0521, pp. 10-11 (La. App. 4th Cir. 12/27/17); 234 So. 3d 1103, 1110.

305. See *id.*

306. *Roberts*, 605 So. 2d at 1044.

307. Malone, *Dixie Drive It*, *supra* note 5.

308. *Id.* at 392 (emphasis omitted).

309. *Id.*

there can be no such thing as a *rule* of the *Dixie* decision which might require that the case be distinguished in future litigation.”³¹⁰

If there can be no such rule concerning the scope of the defendant’s duty or liability, even in a violation of statute negligence case—because the decision is fact-specific—then why does the judge decide scope of duty? If the decision is dependent upon the facts of the particular case and policy is not involved at a broad class of plaintiffs, class of risks, or class of damages level, it makes more sense for juries or judges as fact finders to make the decision. Having judges make the scope of duty decision, even when it clearly, per Malone, does not result in a rule,³¹¹ runs the risk that lawyers will still treat the decision as a legal decision and rely on it in moving for summary judgment. And there is the risk that lower court trial and appellate judges,³¹² in deciding and reviewing cases on summary judgment, will treat prior decisions as if they were law and not case-specific decisions.³¹³

In his very scholarly opinion in *Pitre v. Opelousas General Hospital*,³¹⁴ Justice Dennis noted the limits of the Duty/Risk method, where judges do not really analyze the relevant policies. Instead, he endorsed a “legal cause approach” where the nature and extent of damages was at issue. He wrote:

The legal cause [synonymous with scope of duty or liability or protection in this paper] of the damage in question could be stated as part of the duty inquiry: was the defendant under a duty to protect each of the plaintiff’s interests affected against the type of damage that did in fact occur? Such a form of statement is sometimes helpful because it is less likely than “proximate cause” to be interpreted as if it were policy free fact finding; thus, “duty” is more apt to direct attention to the policy issues which

310. *Id.* at 393.

311. *Id.*

312. *Kenney v. Cox*, 95-0126, p. 1 (La. 3/30/95); 652 So. 2d 992, 992 (Dennis, J., concurring). Therein, Justice Dennis noted the problem, stating:

Consequently, the Court of Appeal treated as purely a legal question the issue of whether the harm caused decedent was within the scope of a duty owed her by the defendants. Because I feel that our jurisprudence has not clarified the distinction between the existence of a general duty of care (a legal question) and the “legal cause” or “duty/risk” question of the particular duty owed in a particular factual context (a mixed question of law and fact), and because this question is of special significance in the summary judgment context, I believe that it would be appropriate for us to grant the writ to consider this question more carefully.

Id.; cf. *Paul v. La. State Emps.’ Group Benefit Program*, 1999-0897, p. 9 (La. App. 1st Cir. 5/12/00); 762 So. 2d 136, 143 (noting legal cause is a purely legal question).

313. Or even, if illogically, as the basis for an exception of no cause of action.

314. 530 So. 2d 1151 (La. 1988).

determine the extent of the original obligation and its continuance, rather than to the mechanical sequence of events which goes to make up causation in fact. The duty risk approach is most helpful, however, in cases where the only issue is in reality whether the defendant stands in any relationship to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff's benefit. Terms such as "duty" are merely verbal expressions of policy decisions and do not explain them. Allusions to policy should not be made a substitute for more determinate legal principles when they may be utilized.³¹⁵

There were and are other judicial indications that the scope of responsibility question was not a purely legal question but a mixed question of law and fact.³¹⁶

In *Broussard v. State ex rel. Office of State Buildings*,³¹⁷ the court was not considering the scope of the defendant's duty, but rather the

315. *Id.* at 1155-56 (citations omitted). He continued, in proposing a "legal cause" alternative:

It is the task of the bench and the bar not only to ensure that justice is done, but also to demonstrate that it is being done *according to law*, which is essential to preserving public confidence. Policy considerations do indeed shape one's sense of the right decision, but whenever possible these should be given effect through the indispensable minimum of principles of liability in negligence, nebulous though they may be in themselves. Accordingly, we conclude that, when the case presents difficult issues as to the nature and extent of damages ascribed to the defendant, once it has been decided that the defendant's breach of a duty in fact caused damage to the plaintiff, it may be helpful to use a "legal cause" analysis which affords the application of "foreseeability" rules and other concepts of limitation. Although indistinct, these rules and concepts are more determinate than the abstract idea of a "duty" based on various "policy considerations" and may prove more helpful to triers of the facts, at least as starting points for legal reasoning.

Id. at 1156 (citation omitted). The rules he proposed for determining legal cause were a series of foreseeability rules based on whether the injury resulted from impact and the level of the defendant's fault. *Id.* at 1161-62.

316. See, e.g., *Kenney*, 95-0126, p. 1; 652 So. 2d at 992 (Dennis, J., concurring). Justice Dennis, concurring in a reversal of a summary judgment for defendant, wrote:

Consequently, the Court of Appeal treated as purely a legal question the issue of whether the harm caused decedent was within the scope of a duty owed her by the defendants. Because I feel that our jurisprudence has not clarified the distinction between the existence of a general duty of care (a legal question) and the "legal cause" or "duty/risk" question of the particular duty owed in a particular factual context (a mixed question of law and fact), and because this question is of special significance in the summary judgment context, I believe that it would be appropriate for us to grant the writ to consider this question more carefully.

Id.; see also *Parents of Minor Child v. Charlet*, 2013-2879, p. 6 (La. 4/4/14); 135 So. 3d 1177, 1181 ("Whether this particular priest owed this particular duty to the plaintiffs in this particular factual context is a mixed question of law and fact.").

317. 2012-1238 (La. 4/5/13); 113 So. 3d 175.

conflation of duty and breach³¹⁸ that had occurred or might occur in Louisiana “open and obvious” cases.³¹⁹ There, the court held that determining breach—whether a thing posed an unreasonable risk of harm—involved a “myriad of factual considerations,” “an abundance of factual findings,” and “an application of those facts to a less-than scientific standard, [such that] a reviewing court is in no better position to make the determination than the jury or trial court.”³²⁰ The same is true for scope of liability or duty. A decision on the scope of liability or duty involves the facts and factual findings. It involves fairness and justice at a case-specific level. It is the essence of a mixed question of law and fact. *Scope of liability or duty is a matter for the fact finder, not the lawgiver.* And its legal or persuasive force is nil except as the decision of a particular case at a particular time and place by a particular fact finder. It is time for the Louisiana courts to recognize this basic truth and consistently articulate it and apply it. I return to this point in my final Part of recommendations. But in the next subpart I discuss the courts’ inconsistent articulation of the various elements of the Duty/Risk analysis and the order in which a court should consider each of those elements.³²¹

318. A related subject beyond the scope of this piece.

319. *Broussard*, 2012-1238 at p. 1, 113 So. 3d at 178.

320. *Id.* at pp. 12-13, 113 So. 3d at 185-86 (citing and quoting *Reed v. Wal-Mart Stores, Inc.*, 97-1174, p. 4 (La. 3/4/98); 708 So. 2d 362, 364-65).

321. Louisiana courts have also manifested two other tendencies that are not inevitable but that are unfortunate. These two tendencies also point in the direction of necessary change. First, some courts continue to mix together cause-in-fact and scope of duty or “proximate” cause. Second, courts still tend to emphasize the order in which events have occurred rather than the relation between the alleged tortious behavior and the risk and employ terms like “superseding cause” or “sole proximate cause.” To reiterate, one of the primary targets of the legal realists—Green and Malone—was to force courts and lawyers to acknowledge and to separate the factual issue of cause from the scope of duty question. See text accompanying *supra* notes 59-60. The issue of factual cause is what we have come to call cause-in-fact. Courts usually decide cause-in-fact by asking whether it is more likely than not that “but for” the defendant’s particular, alleged act of negligence, the plaintiff would not have suffered the particular injuries involved. Some cases use the substantial factor language but then essentially use the “but for” test. See, e.g., *Breithaupt v. Sellers*, 390 So. 2d 870, 873 (La. 1980); *Perkins v. Tex. & New Orleans R.R. Co.*, 147 So. 2d 646, 648-49 (La. 1962). Alternatively, the court will sometimes ask whether the defendant’s negligence was a “substantial factor” in bringing about the plaintiff’s injuries. Jeremiah Smith articulated the “substantial factor” test, and Green endorsed it. GREEN, RATIONALE OF PROXIMATE CAUSE, *supra* note 12, at 137, 140-41 (quoting Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 303 (1912)). Arguably, Malone’s most renowned article is on cause-in-fact. Malone, *Ruminations on Cause-in-Fact*, *supra* note 1. Happily, for the most part, courts ably keep the cause-in-fact analysis separate from the scope of duty or liability analysis but not always. In *Vince v. Koontz*, 16-521, p. 10 (La. App. 5th Cir. 2/8/17); 213 So. 3d 448, 456,

C. Inconsistent Analytical Approaches, i.e., Duty/Risk Deviations

As noted in the previous subpart, courts frequently do not and, I contend, neither should nor can make a meaningful policy analysis in a garden-variety tort case at the fact- or case-specific level. The courts' failure to engage in that fact-specific policy analysis is not flawed; it is inevitable, and it counsels the need to entrust the case-specific scope of duty question to the fact finder as a mixed question of fact and law, rather than to the judge as a legal question. But, before continuing that discussion, another rather unfortunate judicial trend demands our attention. Louisiana courts are remarkably inconsistent in their articulation of the order of the key steps or elements in the Duty/Risk analysis and in articulating the proper method courts should use in analysis.

the jury was informed "proximate cause" is "the primary act which produces the accident." After consideration of the foregoing, we find this definition describes the cause-in-fact element. Accordingly, when the jury found Mr. Koontz's negligence was not the "proximate cause" of the accident, it appears the jury actually determined that Mr. Koontz's negligence was not the cause-in-fact of the accident.

The court concluded that the trial judge had not properly instructed on proximate cause. *Id.* But the court held that the error was essentially harmless because the jury in finding no proximate cause had actually found no cause-in-fact. *Id.* at p. 11-12, 213 So. 3d at 457. That decision was not manifestly erroneous because "a defendant's negligence may be severed by intervening and superseding causes." *Id.* at p. 12, 213 So. 3d at 457. The reader will note that intervening and superseding causes were terms that courts used in determining proximate cause, not cause-in-fact. *Lahare v. Valentine Mech. Servs., LLC*, 17-289, p. 6 (La. App. 5th Cir. 6/29/17); 223 So. 3d 773, 778 ("While it may be true that Ms. Lahare would not have been walking from door to door but for Valentine's actions, the alleged defect in the sidewalk was the intervening and superseding cause of her injuries. And these injuries, caused as they were by tripping over an alleged defect in the sidewalk, were certainly not a reasonably foreseeable risk of Valentine's failure to obtain the proper permit or failure to assist in the variance process. Ms. Lahare cannot prove cause-in-fact."). Thus, it bears emphasizing that cause-in-fact and scope of liability are two separate issues. Whoever decides scope of liability, it is a different issue than cause-in-fact. Cause-in-fact entails a fact-based decision and analysis comparing the defendant's alleged act of negligence and the injuries that the plaintiff suffered. Scope of duty or liability may depend upon the facts, but it is ultimately a decision about fairness, not about causation.

Additionally, some Louisiana courts continue to use terms like intervening and/or superseding cause, *see, e.g.*, *Adams v. Rhodia, Inc.*, 2007-2110, p. 13 (La. 5/21/08); 983 So. 2d 798, 808; *Vince*, 16-521, p. 12; 213 So. 3d at 457; *Arcadian Corp. v. Olin Corp.*, 2001-1060, p. 7 (La. App. 3d Cir. 5/8/02); 824 So. 2d 396, 401; *Domingue v. State Dep't of Pub. Safety*, 490 So. 2d 772, 775 (La. App. 3d Cir. 1986), or "sole cause," *see, e.g.*, *Lewis v. Macke Bldg. Servs., Inc.*, 524 So. 2d 16, 18-19 (La. App. 5th Cir. 1988); *Wood v. Haas*, 451 So. 2d 160, 162 (La. App. 1st Cir. 1984). And courts continue to emphasize the order of events. *See Chanthasalo v. Deshotel*, 2017-0521, pp. 9-11 (La. App. 4th Cir. 12/27/17); 234 So.3d 1103, 1109-10.

The reader will recall that after *Hill*, the analytical order of the elements was cause-in-fact, duty/risk, breach, and damages.³²² In the first years after *Hill*, at least some appellate courts considered the elements in the so-called *Hill* order.³²³ But it was not long before courts began reordering the elements of negligence under the Duty/Risk analytical approach to negligence. For instance, in *Frank v. Pitre*, the Louisiana Court of Appeal for the Third Circuit, while citing *Hill*, articulated the elements in the following order: duty, breach, cause-in-fact, and scope of protection.³²⁴ It was not long before the Louisiana Supreme Court followed suit and deviated from the *Hill* analytical order of negligence elements.

For instance, in the Louisiana Supreme Court's original opinion in *Roberts v. Benoit*, echoing *Frank*, Justice Hall listed the elements of negligence as follows: cause-in-fact, duty, breach, and scope of protection.³²⁵ Then, on rehearing, Justice Cole listed the elements as follows: duty, breach, cause-in-fact, legal cause, and damages.³²⁶ In addition to switching the analytical order in which decision makers address the elements of negligence, Justice Cole used the phrase legal cause instead of scope of protection.

Subsequently, in *Cay v. State DOTD*, the court said negligence consisted of cause-in-fact, duty, breach, and scope of duty.³²⁷ In *Joseph v. Dickerson*, the court repeated that order of analysis but used the words legal cause, instead of scope of protection, and added

322. *Hill v. Lundin Assocs., Inc.*, 256 So. 2d 620, 622-23 (La. 1972).

323. See, e.g., *Carter v. City Par. Gov't of E. Baton Rouge*, 423 So. 2d 1080, 1084-88 (La. 1982); *Lee v. Vidrine*, 316 So. 2d 402, 403-04 (La. App. 3d Cir. 1975); *Stewart v. Gibson Prods. of Natchitoches Par. La., Inc.*, 300 So. 2d 870, 876-77 (La. App. 3d Cir. 1974); *Mixon v. Allstate Ins. Co.*, 300 So. 2d 232, 235-39 (La. App. 2d Cir. 1974). Once again, I am not trying to be encyclopedic here, merely to show some trends. *Hill* has been cited by courts 454 times.

324. 341 So. 2d 1376, 1379 (La. App. 3d Cir. 1977) (citing *Hill*, 256 So. 2d at 621-23).

325. 605 So. 2d 1032, 1041 (La. 1991), *on reh'g*, 605 So. 2d 1032 (La. 1992) (dealing with negligent hiring, training, and supervising and vicarious liability); see also *Lazard v. Foti*, 2002-2888, p. 3 (La. 10/21/03); 859 So. 2d 656, 659 (listing them as cause-in-fact, duty, breach, and scope of protection); *Posecai v. Wal-Mart Stores, Inc.*, 99-1222, p. 4 (La. 11/30/99); 752 So. 2d 762, 765 (listing them as cause-in-fact, duty, breach, and scope of protection).

326. *Roberts*, 605 So. 2d at 1051.

327. 93-0887 (La. 1/14/94); 631 So. 2d 393, 395-99; see also *Broadnax v. Foster*, 47,079, pp. 7-8 (La. App. 2d Cir. 4/11/12); 92 So. 3d 427, 432 (listing them as cause-in-fact, duty, breach, and scope of protection); *Williams ex rel. Williams v. Jones*, 2009-839, p. 5 (La. App. 5th Cir. 2/23/10); 34 So. 3d 926, 929-30 (same).

damages.³²⁸ The variety of ordering approaches has continued.³²⁹ For instance, in *Chanthasalo v. Deshotel*, the court stated that the elements of negligence were duty, breach, cause-in-fact, legal cause, and damages,³³⁰ echoing Justice Cole's order of elements from *Roberts*.³³¹

Of course, one may shrug one's shoulders and say, what or why does it matter? And perhaps it really doesn't matter if the same basic elements are at issue whatever order one employs to consider them. But I think it does matter. For one thing, it causes confusion.³³² Just what are the elements of negligence, and how does a lawyer or a lower court judge present them? The confusion leads to inconsistency in approach. Emerson was no doubt right when he said, "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines."³³³ The key word of course is "foolish." There is value in consistency. It allows people to plan and to rely upon stable rules and expectations. One may counter that if the substantive elements (rules) are the same, the order in which a court analyzes them

328. 99-1046, 99-1188, p. 6 (La. 1/19/00); 754 So. 2d 912, 916.

329. *Wiltz v. Bros. Petroleum, L.L.C.*, 2013-332, 2013-334, 2013-333, p. 9 (La. App. 5th Cir. 4/23/14); 140 So. 3d 758, 766-67 (listing duty, breach, cause-in-fact, legal cause or scope of liability or protection, and actual damages); *J.M. ex rel. A.C. v. Acadia Par. Sch. Bd.*, 2008-1377, p. 4 (La. App. 3d Cir. 4/1/09); 7 So. 3d 150, 153 (listing duty, breach, cause-in-fact, scope of liability or protection, and damages); *cf. Rando v. Anco Insulations Inc.*, 2008-1163, 2008-1169, pp. 26-27 (La. 5/22/09); 16 So. 3d 1065, 1086 (listing cause-in-fact, duty, breach, scope of protection); *Mathieu v. Imperial Toy Corp.*, 94-0952, pp. 4-5 (La. 11/30/94); 646 So. 2d 318, 321-22 (listing cause-in-fact, duty, breach, and scope of protection); *England v. Fifth La. Levee Dist.*, 49,795, pp. 5-6 (La. App. 2d Cir. 6/3/15); 167 So. 3d 1105, 1109-10 (same); *Covington v. Howard*, 49,135, p. 5 (La. App. 2d Cir. 8/13/14); 146 So. 3d 933, 937 (listing duty, breach, cause-in-fact, legal cause, and damages); *Kulka v. Shag II*, 2012-398, p. 5 (La. App. 3d Cir. 10/24/12); 100 So. 3d 412, 415 (same); *Frederick v. Vermillion Par. Sch. Bd.*, 2000-382, p. 3-4 (La. App. 3d Cir. 10/18/00); 772 So. 2d 208, 212 (listing duty, breach, cause-in-fact, and scope of protection), *writ denied*, 781 So. 2d 561 (La. 2001). Compare, using the classic *Hill* order, *Thomas v. Sisters of Charity of the Incarnate Word*, 38,170, p. 10 (La. App. 2d Cir. 3/19/04); 870 So. 2d 390, 397 (listing cause-in-fact, duty, breach, scope of protection).

330. 2017-0521, p. 6 (La. App. 4th Cir. 12/27/17); 234 So. 3d 1103, 1107-08; *see also Chatman v. S. Univ. at New Orleans*, 2015-1179, pp. 10-11 (La. App. 4th Cir. 7/16/16); 197 So. 3d 366, 374 (listing duty, breach, cause-in-fact, legal cause, and damages).

331. *See Roberts*, 605 So. 2d at 1051.

332. Last year when we were discussing the changing order of negligence in my torts class, a student, Corinne Gamble, raised her hand and asked, in reference to the shifting order of elements, "Can they do that?" I nodded slowly and said, "Yes, they, especially the Louisiana Supreme Court, can do what they want."

333. *Quote by Ralph Waldo Emerson*, GOODREADS, <https://www.goodreads.com/quotes/353571-a-foolish-consistency-is-the-hobgoblin-of-little-minds-adored> (last visited Feb. 27, 2020).

will not impact the primary activity³³⁴ of those subject to the rules. But the order of analysis will impact the activity and strategy of lawyers who are working to protect the rights of those engaged in planning their primary activity in commerce, medicine, manufacturing, hiring, and even driving. I would contend that lawyers are important actors on today's American stage of economic activity and to the extent lawyers are confused by inconsistent analysis and application of law, the confusion will have a potential impact on those subject to that law. In the case of tort law, that is all of us.

Let me pause for a moment and make some observations on the *Hill* order of analysis. Reiterating, the court began with cause-in-fact as the first element in the analysis.³³⁵ Perhaps it made sense to analyze cause-in-fact first because, if there is no factual cause, then the appropriate decision maker need not undertake the stickier, more fairness-based analyses of Duty/Risk and breach. That is fine for a trial to the bench, but what about a jury trial? Confusion abounds when the second element per *Hill* is Duty/Risk.³³⁶ Does the defendant owe a duty to this plaintiff to protect against the relevant risk? If this is indeed a question of law, then the judge decides it as lawgiver and not as fact finder. This is where, per Green and Malone, the court supposedly conducts a legal/social policy analysis.³³⁷ Even if the particular scope of risk question is for the fact finder, the broader duty issue is for the court, and if duty (or Duty/Risk) is the second (or second and third elements and, as noted above, many courts have split the Duty/Risk question into two questions), the court still makes a legal decision after the fact finder has made a factual or mixed fact and law decision (on cause-in-fact). That is all well and good; however, if the purpose of having the court analyze cause-in-fact first was to avoid the necessity of a policy-based duty or Duty/Risk decision, the logic of the order is suspect. It is suspect because whenever the fact finder decides that the defendant was a cause-in-fact of the plaintiff's injuries and the court decides that there is no duty (or the risk was not within the scope of any duty as a matter of law), the fact finder will have made a meaningless

334. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 381-82, 403-04 (1970); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 450 (tent. ed. 1958).

335. *Hill v. Lundin Assocs., Inc.*, 256 So. 2d 620, 622 (La. 1972).

336. *Id.*

337. GREEN, *RATIONALE OF PROXIMATE CAUSE*, *supra* note 12, at 76-77; Malone, *Cause-in-Fact*, *supra* note 1, at 72; Malone, *Dixie Drive It*, *supra* note 5.

cause-in-fact determination, which is certainly not efficient. And in a jury trial, the court will have empaneled a jury to make that decision.

The illogic does not stop there. If the fact finder decides that the defendant was a cause-in-fact of the plaintiff's injuries and the court decides that the defendant owed the plaintiff a duty and that the risk was within the scope of the duty, then and only then, per the *Hill* elemental schemata, does the fact finder decide whether there has been a breach of the relevant duty.³³⁸ It is a veritable tennis match of negligence elements between the judge and the fact finder. The fact finder decides cause-in-fact. The lawgiver decides duty and/or Duty/Risk. The fact finder decides breach.

It is even worse for those courts that separate the duty and risk elements.³³⁹ Those courts that separate the two have an additional volley. For instance, in *Cay*, the court considered the elements of negligence in the following order: cause-in-fact, duty, breach, scope of protection, and damages.³⁴⁰ Thus, the allocation of decision-making in the order would be:

Element	Who Decides
Cause-in-Fact	Fact Finder
Duty	Judge
Breach	Fact Finder
Scope of Liability	Judge ³⁴¹
Damages	Fact Finder ³⁴²

One may safely assume that the hypothetical back-and-forth volleying of decision-making between judge and fact finder would not require multiple coffee breaks between elements (sets!) in a jury trial. Presumably, the judge would decide those issues the judge should decide, and the fact finder would decide those issues the fact finder should decide. In a case tried to the court, the judge would be careful to separate his or her functions. In either case, would it make sense to group the elements together in order with the appropriate decision makers? Otherwise, there is one potential "order" of decision at trial

338. *Hill*, 256 So. 2d at 623.

339. See cases cited *supra* note 329.

340. *Cay v. State ex. rel Dep't & Transp. & Dev.*, 93-0087 (La. 1/14/94); 631 So. 2d 393, 395-99.

341. Of course, the argument herein is that the jury or judge as fact finder should decide scope of liability.

342. And the fact finder would thereafter consider whether the plaintiff was also negligent (as in *Cay*) and allocate fault. *Id.* at 399.

and another on appeal. That has the potential to confuse lawyers, judges, law students, and people writing about the law.³⁴³ Moreover, having different trial orders of deciding and appellate orders of deciding is inconsistent with transparency unless it is clearly explained. My sense is that any explanation of the inconsistency could never be quite clear to someone untrained in the law; nor would it be wholly convincing to someone trained in the law.

The court ought to decide “law” issues first. First, if there is no duty, there is no reason to empanel a jury, no reason to call witnesses, etc. The case is over before the justice system spends precious societal resources on deciding factual questions or mixed questions of fact and law. Second, having the court decide legal issues first is consistent with trial process and practice. That is, typically, the plaintiff sues. The defendant at that stage, even before answering, can move for dismissal. In Louisiana, the appropriate procedural devices are the exception of no cause of action or the exception of no right of action.³⁴⁴ The defendant claims that, based on the pleadings, the plaintiff has not alleged any viable cause of action against it. In a negligence case, the defendant says, I owe no duty to the plaintiff. Or the defendant says, While I may owe a duty to someone, I do not owe a duty to this person. These are legal questions that the court can decide at the outset. If the court denies the exception(s), then the machination of developing and discovering facts can begin.³⁴⁵ Of course if reasonable minds could not disagree on cause-in-fact, breach, or scope of liability/risk, a court might grant a summary judgment for one side or the other before trial.³⁴⁶

Finally, beyond the order of decision, as I have pointed out, courts are not consistent in their analytical approaches to deciding negligence. Some refer to scope of liability or scope of the risk. Others use the phrase legal cause. And courts, even the same court on the same case, mix approaches. For instance, in *Lazard v. Foti*, the parents of a sixteen-year-old who was detained by law enforcement as an adult, released,

343. I.e., law professors.

344. LA. CODE CIV. PROC. arts. 923, 927(A)(5)-(6) (2020).

345. Thereafter if the court denies the exceptions, the defendant would answer, the parties would conduct discovery, and then the defendant might move for summary judgment. Of course, the defendant might move for summary judgment on any issue, contending that there are no material issues of fact. In a negligence action, where the defendant moves for summary judgment because there are no material issues of fact, the court must be careful to gauge exactly what it is deciding: a legal matter or a factual matter or a matter involving a mixed question of fact and law.

346. *Id.* art 966.

and killed twelve hours later, sued the sheriff who had detained the minor.³⁴⁷ The majority held that the sheriff was not liable,³⁴⁸ but there were three opinions revealing three very different approaches to the duty, scope of duty, Duty/Risk, and legal cause conundra. Justice Traylor's majority opinion was straight Duty/Risk and analyzed the scope of duty imposed by a statute, its underlying policy and purpose, and its reach.³⁴⁹ Justice Weimer's concurrence suggested considerations of time, place, and bizarreness.³⁵⁰ Finally, Justice Johnson in her dissent called for a trial of the underlying claim because of critical factual issues that bore on the scope and reach of any duty owed.³⁵¹

VI. RECAP AND REENERGIZING

Before proceeding, a short recap is advisable. The law's nineteenth- and early twentieth-century approach to deciding proximate cause was a fake. Judges hid a fairness decision behind vague "magic" words like cause, foreseeable, unforeseeable, direct, remote, natural and probably, intervening causes, superseding causes, and more.³⁵² The great torts scholars of the twentieth century, including Green and Malone, building on the work of some who came before them, saw, in the spirit of Legal Realism, that something else was going

347. 2002-2888, p. 1 (La. 10/21/03); 859 So. 2d 656, 658; *see also* Brooks v. State ex rel. Dep't of Transp. & Dev., 2010-1908, pp. 3-10 (La. 7/1/11); 74 So. 3d 187, 189-93 (containing different approaches to negligence in the opinions). There the decedent, while at work as operating engineer, was driving a backhoe along the shoulder of a state highway in an industrial area to deliver to another company (and thereby avoid expense of loading the backhoe onto a truck). *Brooks*, 2010-1908, at p. 1, 74 So. 3d at 188. The backhoe flipped while making a turn from the highway shoulder onto a driveway and crushed the man to death. *Id.* at pp. 1-2, 74 So. 3d at 188-89. The man's family filed a wrongful death suit against the DOTD. *Id.* at p. 2, 74 So. 3d at 189. There was a jury verdict in favor of the plaintiffs, and it was affirmed by the appellate court but amended to attribute 20% of fault to the driver. *Id.* In denying recovery, the majority of the Louisiana Supreme Court found that the condition of the shoulder did not present an unreasonable risk of harm and that the DOTD's duty did not encompass the risk that occurred. *Id.* at pp. 8-10, 74 So. 3d at 192-93. Justice Knoll concurred but found that the DOTD did not owe the decedent any duty. *Id.* at p. 1, 74 So. 3d at 195 (Knoll, J., concurring). Justice Johnson dissented, finding that the DOTD owed the decedent a duty, which it breached. *Id.* at pp. 1-3, 74 So. 3d at 194-95 (Johnson, J., dissenting).

348. *Lazard*, 2002-2888, p. 8, 859 So. 2d at 662.

349. *See id.* at pp. 5-8, 859 So. 2d at 660-62.

350. *See id.* at p. 1, 859 So. 2d at 666 (Weimer, J., concurring) (quoting *Roberts v. Benoit*, 605 So. 2d 1032, 1058 (La. 1991)).

351. *See id.* at pp. 6-7, 859 So. 2d at 665 (Johnson, J., dissenting).

352. *See, e.g., Malone, Dixie Drive It, supra* note 5, at 363-64.

on. They knew that judges using magic words were like the wizard working in Oz.

Green and Malone ripped back the curtain, and they claimed that the issue courts called proximate cause was really an issue of policy, involving various policies at stake in the administration of justice.³⁵³ As noted, Green articulated those policies as the following: the administrative factor, the ethical or moral factor, the economic factor, the prophylactic or preventive factor, and the justice factor, including the capacity to bear the loss.³⁵⁴ But, as the discussion in Part V above showed, Louisiana courts in most garden-variety torts cases have not, in fact, analyzed policy but have instead made case-specific, fairness-based decisions dependent on the facts of the particular case before the court. I have contended herein that these fact-specific fairness decisions are not “policy”-based decisions for a court but are more appropriately mixed questions of fact and law. And, as such, the scope of liability/risk question is really a question for the fact finder and resolution of the scope of liability/risk issue is dependent on the specific facts at issue. It is not a legal decision. If it is “law” at all, it is only “law” for the parties to the particular case; it is not “law” for anyone else. Treating scope of liability/risk in a garden-variety tort case as a legal decision would also impact the standard of review that an appellate court employs: *de novo* on issues of law or manifest error on issues of fact or mixed questions of fact and law. If the scope of liability determination is a legal determination, then the court would review it *de novo*, but if it is a mixed question of law and fact law, the court’s review would be under the manifest error standard.³⁵⁵ Since the scope of liability/risk decision should be for the fact finder, the appropriate standard of review should be manifest error.

In so contending, I am echoing what my friend Dave Robertson said over twenty years ago when he proposed his “Keetonian” model for allocating decision-making in Louisiana tort cases.³⁵⁶ He said that fact finders should decide scope of liability.³⁵⁷ I am also influenced by my friend Professor Chamallis’ observation, noted above, that policy really is not at stake in most garden-variety negligence cases. That is,

353. GREEN, RATIONALE OF PROXIMATE CAUSE, *supra* note 12, at 76-77; Malone, *Cause-in-Fact*, *supra* note 1, at 72; Malone, *Dixie Drive It*, *supra* note 5.

354. GREEN, JUDGE AND JURY, *supra* note 45, at 74-152.

355. *See, e.g., Adams v. Rhodia*, 2007-2110, p. 10 (La. 5/21/08); 983 So. 2d 798, 806 (reviewing a determination of scope of risk under the manifest error standard).

356. Robertson, *Allocating Authority*, *supra* note 19, at 1092-96.

357. *Id.*

at the fact-specific level, most tort cases really are not vehicles for shaping future conduct and influencing law and society. Most cases involve basic fairness between the parties, based on the particular facts. There are policy-dominant cases where the law can shape the future. These are what I think of as true duty cases—cases like those discussed in the next Part. In those cases, the issues are analyzed at the categorical level, and the courts truly do (and should) consider the policy implications of their decisions. But most tort cases are not like that; they are not categorical, but fact-specific. There, policy is not involved; the case will not shape the future. But the decision will hopefully provide case-specific justice for the parties.

Returning to Robertson, Justice Lemmon, in a concurring opinion in *Pitre v. Louisiana Tech University*, quoted Robertson and his coauthors as follows:

The statement that “the defendant had no duty,” as noted in Professor David W. Robertson et al, *Cases and Materials on Torts* 161 (1989), should be reserved for those “situations controlled by a rule of law of enough breadth and clarity to permit the trial judge in most cases raising the problem to dismiss the complaint or award summary judgment for defendant on the basis of the rule.” Thus, a “no duty” defense generally applies when there is a categorical rule excluding liability as to whole categories of claimants or of claims under any circumstances. In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant’s conduct should be done in terms of “no liability” or “no breach of duty.”³⁵⁸

So, where in the negligence formula, if anywhere, does the Green/Malone policy analysis take place? Like Robertson said: at the duty determination. And, like Robertson and his coauthors noted, the court should engage in the duty/no duty analysis at the categorical level, not at the case-specific level. There are, in fact, Louisiana Supreme Court cases that wonderfully demonstrate the appropriate categorical level of analysis. I turn next to two of those decisions.

VII. DUTY AS POLICY

In *Reynolds v. Bordelon*, the issue before the court was whether Louisiana would recognize a claim for negligent spoliation.³⁵⁹ The

358. 95-1466, 95-1487, p. 22 (La. 5/10/96); 673 So. 2d 585, 596 (Lemmon, J., concurring) (quoting DAVID W. ROBERTSON, WILLIAM POWERS, JR. & DAVID A. ANDERSON, *CASES AND MATERIALS ON TORTS* 161 (1989)).

359. 2014-2362, p. 1 (La. 6/30/15); 172 So. 3d 589, 592.

court decided that it would not, in part because there were multiple other avenues available to protect litigants where evidence was, or might be, destroyed or damaged.³⁶⁰ Justice Clark clearly and, in my schematic for decision, properly articulated the issue as a duty issue.³⁶¹ In discussing that duty issue, he analyzed and wrote categorically. The decision and opinion did not depend upon the specific facts of the case, but rather on the categorical issue of whether Louisiana should recognize a duty to preserve evidence from negligent destruction. The court carefully discussed the relevant policies and considered each in the context of whether Louisiana should impose a duty not to negligently destroy evidence.³⁶² Justice Clark analyzed the broad issue in terms of “deterrence of undesirable conduct, avoiding the deterrence of desirable conduct, compensation of victims, satisfaction of the community’s sense of justice, proper allocation of resources (including judicial resources), predictability, and deference to the legislative will.”³⁶³ The reader will recognize these policies as a modernized statement of the Green policies.³⁶⁴ In deciding not to recognize a duty, the court articulated “a categorical rule excluding liability as to [a] whole categor[y] of claimants or of claims under any circumstances.”³⁶⁵ And it did so after considering each of the policy factors articulated above.³⁶⁶

360. *Id.* at pp. 13-14, 172 So. 3d at 600. The court said:

Discovery sanctions and criminal sanctions are available for first-party spoliators. Additionally, Louisiana recognizes the adverse presumption against litigants who had access to evidence and did not make it available or destroyed it. Regarding negligent spoliation by third parties, the plaintiff who anticipates litigation can enter into a contract to preserve the evidence and, in the event of a breach, avail himself of those contractual remedies. Court orders for preservation are also obtainable. In this particular case, the plaintiff also could have retained control of his vehicle and not released it to the insurer, thereby guaranteeing its availability for inspection. Furthermore, he could have bought the vehicle back from the insurer for a nominal fee. Thus, we find the existence of alternate avenues for recovery further support our holding.

Id.

361. *See id.* at pp. 1, 8, 172 So. 3d at 592, 596-97.

362. *See id.* at pp. 8-13, 172 So. 3d at 596-600.

363. *Id.* at p. 8, 172 So. 3d at 596 (quoting FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW § 5.02 (2d ed. 2004)).

364. *See* GREEN, JUDGE AND JURY, *supra* note 45, at 74-152.

365. *Pitre v. La. Tech Univ.*, 95-1466, 95-1487, p. 1 (La. 5/10/96); 673 So. 2d 585, 596 (Lemmon, J., concurring).

366. It is not important for present purposes whether one agrees with the court’s decision. Its method, for my purposes, is unassailable.

Years before, in *Pitre v. Opelousas General Medical Center*,³⁶⁷ the Louisiana Supreme Court considered how Louisiana tort law would approach wrongful pregnancy,³⁶⁸ wrongful birth,³⁶⁹ and wrongful life claims.³⁷⁰ The court, in a scholarly opinion by then-Justice Dennis, considered precedent in other states on the relevant issues—an appropriate factor.³⁷¹ As to the child's claim, Justice Dennis aptly applied the policies of tort law at the categorical level. He wrote:

The persons at whose disposal society has placed the potent implements of technology owe a heavy moral obligation to use them carefully and to avoid foreseeable harm to present or future generations. In the field of medicine, as in that of manufacturing, the need for compensation of innocent victims of defective products and negligently delivered services is a powerful factor influencing tort law. Typically in these areas also the defendants' capacity to bear and distribute the losses is far superior to that of consumers. Additionally these defendants are in a much better position than the victims to analyze the risks involved in the defendants' activities and to either take precautions to avoid them or to insure against them. Consequently, a much stronger and more effective incentive to prevent the occurrence of future harm will be created by placing the burden of foreseeable losses on the defendants than upon the disorganized, uninformed victims.³⁷²

One will recognize that the policies he articulated and considered were morality, compensation, capacity to bear the loss, who is in the best position to analyze and prevent the loss,³⁷³ and deterrence. As can be seen, the court analyzed each of the applicable policies at the categorical level, not at the case-specific level. In this regard, the

367. 530 So. 2d 1151 (La. 1988).

368. The claim of the parents that they became pregnant, usually as a result of the fault of a health care provider, when they did not intend to do so. *Id.* at 1153-54.

369. The claim of the parents that they became pregnant, usually as a result of the fault of a health care provider, with a child who suffered from some condition that made it more burdensome to raise the child than one might otherwise anticipate. *Id.*

370. The claim of a child born, usually as a result of the fault of a health care provider, with a condition that made life more challenging than one would otherwise anticipate. *Id.*

371. *See id.* at 1154-55, 1157-58.

372. *Id.* at 1157. Interestingly, Justice Dennis later lists these same policy factors as he begins to discuss legal cause. *Id.* at 1161. Perhaps this is due to the inevitable overlap between factors relevant to decision of the various elements of negligence. But I would contend that it is not for the fact finder, when deciding scope of liability, to attempt to undertake any articulated logical analysis of the articulated policies other than as part of its decision on basic fairness or common sense.

373. *See id.* at 1157. This policy is a variation on Judge Calabresi's "cheapest or easier cost avoider." *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 135 n.1 (1970).

analysis is similar to the analysis in *Reynolds*.³⁷⁴ Both opinions reflect a broad, policy-based analysis and articulate duty rules or no duty rules based on that policy analysis.³⁷⁵

But what about at the more case-specific level, and who should decide what? I have already argued that the scope of duty or liability is generally not a policy question; it is a matter of common sense, justice, and fairness. And it is a decision for the fact finder, not the lawgiver. By recognizing that reality and properly allocating decision-making responsibility, Louisiana courts will clarify the law, ensure consistency, and avoid over particularized, picayune, fact-specific decisions masquerading as legal decisions. They will also join the mainstream of American tort law, as articulated in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm.

VIII. FOLLOWING THE RESTATEMENT (THIRD): A BRIGHTER, CLEARER, BETTER FUTURE

The Restatement (Third) of Torts: Liability for Physical and Emotional Harm abandons the terms proximate and legal cause.³⁷⁶ This makes sense because of the intellectual damage these terms have done and the confusion they have caused. In addition, when addressing duty, the redactors imposed a general duty to exercise reasonable care.³⁷⁷ That is, one person generally owes another person a duty to exercise

374. Notably there are other Louisiana Supreme Court decisions where the court undertakes a level at the broad policy level but then decides that, rather than articulate a duty or no duty rule at the categorical level to leave future decisions to the Duty/Risk approach to negligence. *See, e.g.,* *Barrie v. V.P. Exterminators, Inc.*, 625 So. 2d 1007, 1011-18 (La. 1993) (discussing thoroughly the various national approaches to deciding to whom a duty is owed in a negligent misrepresentation case and then, rather than adopting any of those approaches, deciding the case under Louisiana's Duty/Risk approach to negligence); *PPG Indus. Inc. v. Bean Dredging*, 447 So. 2d 1058, 1060-62 (La. 1984) (rejecting a categorical no duty rule in negligent infliction of economic harm cases and relying on the Duty/Risk analysis instead).

375. *See also* *LeJeune v. Rayne Branch Hosp.*, 556 So. 2d 559 (La. 1990) (discussing broad policy for duty). There the court recognized a claim for bystander emotional distress in a negligence action after an extensive analysis of what other jurisdictions' courts had decided and their reasoning. *Id.* at 564-70. The court also recognized the desire, when articulating a new cause of action, to move cautiously and give the lower courts direction, which the court did. *See id.* at 570-71. Justice Lemmon's opinion is a masterpiece of traditional legal reasoning and writing. The legislature later essentially codified the decision with some variation. *See* LA. CIV. CODE art. 2315.6 (2020).

376. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM special note on proximate cause (AM. LAW INST. 2005).

377. *Id.* § 7; *see also id.* § 6 ("An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable.").

reasonable care—a duty to be careful. The general duty to exercise reasonable care is sensible. “Such is the language of the street.”³⁷⁸ It is consistent with how nonlawyers, i.e., jurors, think.

The Restatement (Third) also provides that the general duty to exercise reasonable care may not apply in exceptional cases. What would justify an exception? When is there “an articulated countervailing principle or policy [that] warrants denying or limiting liability”?³⁷⁹ That is, in deciding whether there is a reason to find no duty or to limit the general duty of reasonable care, the court should consider policy at a broad, categorical level.³⁸⁰ This is precisely what the Louisiana Supreme Court did in *Reynolds* in deciding that Louisiana would not impose a duty not to negligently destroy evidence.³⁸¹

But what does the Restatement (Third) say about scope of liability? “An important difference between them is that no-duty rules are matters of law decided by the courts, while the defendant’s scope of liability is a question of fact for the factfinder.”³⁸² Recognizing that scope of liability is a question for the fact finder, as Professor Robertson argued, is appropriate because, as noted above, it depends upon the facts of the particular case.³⁸³ It is not law. It is for the fact finder, which, as noted below, the Restatement (Third) recognizes.

As noted, the Restatement (Third) test for determining scope of liability is remarkably similar to the Louisiana Duty/Risk approach. Indeed, the redactors call their approach the “risk standard.”³⁸⁴ What is the Restatement (Third) “risk standard”? “An actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.”³⁸⁵ In this regard, then, the drafters borrowed from the Legal

378. *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting).

379. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(b).

380. *Id.* § 7 cmt. i (“A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases. Such a ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care. These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability.”).

381. *See Reynolds v. Bordelon*, 2014-2362 (La. 6/30/15); 172 So. 3d 589.

382. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. a.

383. Robertson, *Allocating Authority*, *supra* note 19, at 1092-96.

384. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. d.

385. *Id.* § 29.

Realist approach and the Louisiana approach. But, as the Restatement (Third) makes clear, it is for the jury (fact finder) to decide scope of liability.³⁸⁶ Comment d provides, in part:

Thus, the *jury* should be told that, in deciding whether the plaintiff's harm is within the scope of liability, it should go back to the reasons for finding the defendant engaged in negligent or other tortious conduct. If the harms risked by that tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff's harm. When defendants move for a determination that the plaintiff's harm is beyond the scope of liability as a matter of law, courts must initially consider all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining that conduct tortious. Then, the court can compare the plaintiff's harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter.³⁸⁷

Clearly, then, the Restatement (Third) allocates the scope of liability determination to the jury. The third sentence, which begins to deal with a defendant moving for judgment as a matter of law, does not contemplate the court making a legal decision; rather it contemplates a court deciding whether reasonable minds could not disagree on the scope of liability issue. Put in Louisiana parlance, the Restatement (Third) asks whether a juror (or judge as fact finder) could easily associate the risk that arose in the particular case with what the defendant did, which the juror considered to be a breach of the standard of care. As the redactors note, the risk standard offers "relative simplicity."³⁸⁸

In recognition of that simplicity as well as the wisdom of allocating the scope of liability issue to the fact finder, the Louisiana Supreme Court should adopt and consistently apply the Restatement (Third) approach to negligence. In that regard, we should borrow from the Restatement (Third) as it borrowed its risk approach from us. In adopting the Restatement (Third) approach to duty, the Louisiana Supreme Court should clearly state that generally a person owes a duty to exercise reasonable care to others. The general duty to exercise reasonable care is consistent with Louisiana Civil Code article 2315(A), which provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair

386. *See id.*

387. *Id.* § 29 cmt. d (first emphasis added).

388. *Id.* § 29 cmt. e.

it.”³⁸⁹ The Code article is broad and comprehensive in its sweep. A general duty to exercise reasonable care is consistent with that breadth and sweep. Moreover, it is consistent with Louisiana Civil Code article 2316, which provides, “Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.”³⁹⁰ As in article 2315, the language of article 2316 is broad. It imposes liability for negligence—a type of fault—unfettered by detailed conditions and limitations.

Of course, despite the breadth, Louisiana jurisprudence has long recognized that the law does not impose unlimited liability, and in broad categories of cases, the Louisiana Supreme Court may, after an articulated analysis of the relevant Code articles, policies, and jurisprudence (both in Louisiana and elsewhere), conclude that the general duty to exercise reasonable care either should not apply or should be cabined by other broadly applicable rules. *Reynolds* provides a fine example of such a decision.³⁹¹

But where a negligence case does not involve a decision at the categorical level and the fact-specific scope of liability is at issue, the fact finder should make that decision, not the judge as lawgiver. That is because the scope of liability decision at the case-specific level is exactly that: specific. It depends more upon the facts, fairness, and common sense than it does upon any policy. It depends upon a sense of particularized fairness and the common sense of the community, not social policy, economics, or academic philosophies. I would add that when a court makes a fairness decision under the guise of deciding a legal question, it usurps power from the fact finder.³⁹² I also would argue that in making case-specific fairness decisions, it is difficult to explain them, and it is precisely the place where one’s predetermined views of the world or of fairness arguably have great influence. Another way to say that is to say that, in making a gut-level fairness decision, one’s inherent bias may rear its head. Consequently, I would prefer to have groups of people—juries—making those decisions after

389. LA. CIV. CODE art. 2315(A) (2020).

390. *Id.* art. 2316.

391. See *Reynolds v. Benoit*, 2014-2362 (La. 6/30/15); 172 So. 2d 589. See also *LeJeune v. Rayne Branch Hospital*, 556 So. 2d 559 (La. 1990), where, in an excellent opinion by Justice Calogero, the Louisiana Supreme Court recognized a somewhat limited right for certain bystanders to recover for negligently inflicted emotional distress. The Louisiana Legislature subsequently codified the claim. See LA. CIV. CODE art. 2315.6 (2020).

392. The problem is exacerbated at summary judgment when a judge treats the scope of liability as a legal decision when there are factual issues at stake. In that regard, the court, if it grants summary judgment, clearly usurps the power of the fact finder.

discussion with one another, rather than having only one person make that decision. In cases where the judge is the fact finder, I would urge her or him to be aware that the scope of responsibility or liability issue is not a legal decision *per se*. It calls more on the humanity of the decision maker than her or his legal training.

I urge the courts to continue to avoid the magic words of proximate cause, including foreseeability, sole cause, superseding cause, etc. Instead, the court should ask the jury, when deciding scope of liability, whether the general type of injury that the plaintiff suffered was one of the harms risked when the defendant acted, and acted negligently. That is, “Jurors, do you associate the type of injury which plaintiff suffered with the risks defendant’s conduct posed?” I would add, but not insist upon, “In so deciding you should rely upon your common sense, your experience, and your sense of fairness.” I believe the word fairness, while not free of opacity, is much clearer to the ordinary person than foreseeability, direct, remote, intervening, superseding, etc. It is, in essence, a command to the fact finder to do the right thing in the case before the court—and only that case.

So, recapping, who should decide what?

The court should decide duty at a categorical level. That is, are there policy reasons to limit the general duty to exercise reasonable care? Here the court should consider the Green policies of tort law, any applicable Code articles or legislation, and jurisprudence.

Next the jury³⁹³ should decide whether the defendant breached the appropriate standard of reasonable care. The jury should decide cause-in-fact. Thereafter, it should decide scope of liability or protection. Finally, if it gets that far, the jury should determine damages. Charting this approach to negligence:

Issue	Decision Maker
Duty	Judge
Breach	Jury
Cause-in-Fact	Jury
Scope of Liability/Risk	Jury
Damages	Jury

393. Assuming reasonable minds could not disagree. If no reasonable person could find that the defendant breached the standard of care, then the court should decide as a matter of law (summary judgment, directed verdict, or judgment notwithstanding the verdict), not because the issue is legal, but because no reasonable juror could find for the plaintiff. The same thing is true for all the issues entrusted to the jury.

The table looks remarkably like the table for the traditional elements of negligence,³⁹⁴ but it eschews the words proximate and legal cause in favor of scope of liability, which is what is really going on. I would have no objection if a court preferred to refer to it as scope of responsibility.

In assuring that courts, when deciding duty at the categorical level, consider and articulate the policies on which they rely, the spirit of the Realists—Green and Malone—lives on. The law becomes even more transparent, and courts will both realize and manifest that, in deciding whether to make an exception to the general duty of care, they are making choices. And they should, as Green and Malone argued, articulate the reasons for those choices.

Moreover, in expressly entrusting the scope of liability/risk issue to the fact finder, courts will make clear that scope of liability issues at the case-specific level are not legal questions; they are not based on policy, and they have no precedential value for the future. And in abandoning the language of proximate or legal cause, the courts will make the law simpler and will fulfill the legacies of Green and Malone: eliminate the mumbo jumbo; pull back the curtain; and sensibly allocate decision-making responsibility.

IX. CONCLUSION

Law ought to be as simple as possible. It ought to make sense. It ought to be honest. Today, negligence law in Louisiana is not simple, the courts' approach to it does not always make clear sense, and the judicial approach to analyzing negligence is inconsistent. The proposal set forth herein will go a long way to improving things on all those fronts.

394. See also *Doucet v. Alleman*, 2015-254, p. 3 (La. App. 3d Cir. 10/7/15); 175 So. 3d 1107, 1109 (following essentially the traditional negligence scheme); *Carpenter v. Foremost Signature Ins. Co.*, 47,008, p. 5 (La. App. 2d Cir. 2/29/12); 87 So. 3d 264, 268 (following essentially the traditional negligence scheme).